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6 **UNITED STATES OF AMERICA**  
7 **BEFORE THE NATIONAL LABOR RELATIONS BOARD**

8 UNITED NATURAL FOODS, INC., d/b/a  
9 UNITED NATURAL FOODS, INC.  
and SUPERVALU, INC.

**Case No. 19-CA-249264**

10 and

11 INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS, LOCAL 117

12  
13 INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS, LOCAL 117 and  
14 LOCAL 313

**Case No. 19-CB-250856**

15 and

16 UNITED NATURAL FOODS, INC., d/b/a  
17 UNITED NATURAL FOODS, INC.  
and SUPERVALU, INC.

**TEAMSTERS LOCAL 117 AND  
LOCAL 313'S OPPOSITION TO  
UNFI'S REQUEST FOR SPECIAL  
PERMISSION TO APPEAL  
REGIONAL DIRECTOR'S ORDER  
SEEKING TO REMOVE CLAIMS  
BEING ADJUDICATED BY THE  
BOARD**

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20 **INTRODUCTION**

21 Respondents International Brotherhood of Teamsters, Locals 117 and 313 (together, the  
22 Unions) respectfully submit this response in opposition to Charging Party United Natural Food,  
23 Inc.'s (UNFI) March 9, 2021 Request for Special Appeal Seeking to Remove Claims Being

1 Adjudicated by the Board (Special Appeal).<sup>1</sup> UNFI's appeal is a desperate attempt to enlist the  
2 Board in the company's campaign to usurp the Acting General Counsel's (AGC) and Regional  
3 Director's prosecutorial authority and seize that power for itself. To accomplish this, UNFI  
4 would have the Board reanimate a complaint duly withdrawn before hearing, transfer the zombie  
5 case to itself, and adjudicate it on summary judgment—all in the face of the AGC's active  
6 opposition and considered judgment that the charge lacks merit. Nothing like this has ever  
7 occurred in the history of the National Labor Relations Board (NLRB or Board). Endorsing  
8 UNFI's theory would mean hollowing out Section 3(d) of the Act and converting Board  
9 proceedings into private litigation, in which the General Counsel becomes at best a passive  
10 witness. Disgruntled litigants must not be permitted to decide which cases should or should not  
11 be prosecuted, and the Board must reject UNFI's special appeal.

12 Throughout this dispute, UNFI has tried to steamroll over any entity that stood in the way  
13 of its most coveted goal: ridding itself of its unionized workforce and its collectively bargained  
14 terms of employment. This appeal is just the latest installment. When, in early 2019, UNFI  
15 announced that it intended to close its warehouse in Tacoma, Washington, and build a new one  
16 in Centralia, the company informed the Unions that their contractual Movement of Facilities  
17 provisions—which entitled workers to transfer to new facilities and maintain their terms of  
18 employment—did not apply. Despite the Unions' objection, UNFI proceeded to lay off its  
19 Tacoma employees and hire new workers at Centralia at cut rates. When an arbitrator declared  
20 that the company's actions violated the contracts and ordered it to honor the Movement of  
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22 <sup>1</sup> The title of UNFI's appeal is itself argumentative. As explained below, the Board has not  
23 decided to "adjudicate" any "claims." Nor is the Regional Director "seeking to remove" any such  
24 claims from the Board's consideration. The February 24, 2021 Order withdrew the complaint  
against the Unions and dismissed the charge in Case 19-CB-250856, which rendered UNFI's  
pending motion to the Board moot. *See infra*, Argument, Section I.

1 Facilities provisions, UNFI flouted the award. It promptly filed a lawsuit to vacate the decision  
2 and an unfair labor practice charge against the Unions for having the temerity to enforce their  
3 unit members' rights. With not a hint of irony, UNFI alleged in its charge that by seeking to  
4 allow its unit members to transfer and maintain their wages and benefits, the Unions were  
5 actually "imposing" inappropriate bargaining units and unelected bargaining agents on the  
6 Centralia facility, thereby restraining employees' rights to select their representative and  
7 discriminating in favor of union membership. Thus, by a trick of legal sophistry, the entity which  
8 had just cavalierly discarded its former employees became the protector of workers' rights.

9 Then, despite having just initiated its federal lawsuit, UNFI insisted that its own suit to  
10 vacate the award be stayed so that it could proceed in the forum it deemed most advantageous. It  
11 subsequently persuaded the former General Counsel to direct the issuance of a complaint against  
12 the Unions, even though all authorities to have considered the issue—both Board and federal  
13 courts—have universally repudiated its legal theory. With President Biden's dismissal and  
14 replacement of the former General Counsel, the Unions sought reconsideration of the initial  
15 merits determination and the postponement of the impending hearing. Only after it learned of the  
16 Unions' request, UNFI rushed to file a motion to transfer and for summary judgment so as to  
17 preempt the AGC's review—rightly suspecting that a neutral assessment of the CB charge would  
18 lead to its dismissal. While its motion was pending, and without the Board having accepted  
19 transfer, the AGC instructed the Regional Director to withdraw the complaint against the Unions  
20 and dismiss the CB charge.

21 Now, having trampled over its employees, the Unions, the arbitrator, and the federal  
22 court, UNFI believes it can run roughshod over the AGC and appropriate the Board's legal  
23 machinery for its own ends. Naturally, it packages its appeal as a defense of the Board's  
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1 authority and neutrality. But this body should not be fooled. What UNFI is attempting to do is  
2 eliminate the General Counsel's statutorily guaranteed right to reconsider and withdraw  
3 complaints before hearing without Board supervision.

4 At bottom, UNFI's main argument boils down to the specious claim that the Board was  
5 already "adjudicating" its motion for summary judgment, even though the Board never accepted  
6 transfer of the case or directed the Unions to show cause why summary judgment should not be  
7 granted. Supreme Court precedent, Board case law, and governing regulations all contradict this  
8 theory. At all material times, the AGC maintained jurisdiction over the complaint and his  
9 unreviewable authority to withdraw the complaint before hearing remained intact.

10 UNFI's auxiliary claims are equally without merit. It argues that permitting the AGC to  
11 exercise his independent judgment on the complaint's merits impugns the Board's neutrality, and  
12 that he should be required to blindly follow in his predecessor's footsteps. Of course, no  
13 precedent supports this view. UNFI also takes the opportunity to attack the AGC's appointment  
14 and the former General Counsel's removal. But this too is a red herring, firstly because the order  
15 of dismissal is not reviewable and the issue not ripe, and secondly, because the Act and the case  
16 law interpreting it are clear that the President may remove the General Counsel at-will.

17 For these reasons, and as explained more fully below, UNFI's appeal should be denied.

## 18 **STATEMENT OF FACTS**

### 19 **I. The Underlying Dispute**

20 For years, the Unions have served as exclusive bargaining representatives for units of  
21 employees at a grocery distribution center located in Tacoma, Washington. Declaration of Philip  
22 A. Miscimarra (Miscimarra Decl.), Ex. A ¶¶ 3-4.<sup>2</sup> Local 117 represents a unit of 263

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23 <sup>2</sup> For ease of reference, the Unions cite to documents already introduced by UNFI as exhibits to  
24 declarations in support of its Motion to Sever Case 19-CA-249264, to Transfer Case 19-CB-

1 warehousemen while Local 313 represents a unit of 16 inventory control clerks. *Id.* Both Unions  
2 entered into collective bargaining agreements (CBAs) with grocery chain SuperValu, Inc.  
3 effective from July 15, 2018 through July 17, 2021. *Id.* at ¶¶ 9-10. UNFI acquired SuperValu on  
4 October 22, 2018, became SuperValu’s successor-in-interest, and assumed SuperValu’s CBA  
5 obligations. Ex. A at ¶ 13; Ex. C. at ¶¶ 9-10<sup>3</sup>; Ex. D at ¶¶ 9-10.

6 Both CBAs contain identical “Movement of Facilities” provisions. Ex. A at ¶¶ 7-8; Ex. D  
7 at ¶¶ 7-8. Although they dispute its construction, the Unions and UNFI generally agree that this  
8 language concerns UNFI’s obligations to give Tacoma-based employees the opportunity to  
9 transfer to a new facility located within a certain geographic scope; what, if any, contract terms  
10 should apply to transferees; and under what circumstances UNFI must recognize the Unions as  
11 bargaining representatives of units at the new facility. *See generally* Ex. A at 9-10.

12 On February 5, 2019, UNFI announced that it would consolidate its operations by  
13 opening a new distribution center in Centralia, Washington while closing the Tacoma facility.  
14 *Id.* at ¶ 14. During a meeting on March 18, 2019, UNFI informed the Unions that it did not  
15 believe the Movement of Facilities language applied to its transfer of operations from Tacoma to  
16 Centralia and would therefore not offer Tacoma employees the opportunity to transfer to the new  
17 facility, much less apply to them the same terms and conditions they previously enjoyed. Ex. C  
18 at ¶ 12; Ex. D at ¶ 12. UNFI later denied applications by several Tacoma employees to work at  
19 Centralia and ignored the written requests of approximately 150 others to transfer to Centralia.  
20 Ex. C at ¶¶ 15-16; Ex. D at ¶¶ 15-16. UNFI has since laid-off all of its Tacoma employees. Ex. C

21  
22 250856 to the Board, and for Summary Judgment in Case 19-CB-250856 (Motion for Summary  
23 Judgment) according to the exhibit numbers therein. Unless otherwise indicated, all references to  
24 exhibit numbers in this section refer to those attached to the Declaration of Philip A. Miscimarra.  
<sup>3</sup> Unless otherwise indicated, citations to this pleading refer to paragraphs in the Unions’  
Counterclaim, not in its Answer.

1 at ¶ 23; Ex. D at ¶ 23.

2 On March 26, 2019, the Unions filed grievances against UNFI for violating their  
3 respective CBAs' Movement of Facilities provisions. Ex. C at ¶ 14; Ex. D at ¶ 14. Those  
4 grievances were eventually consolidated and advanced to an arbitration hearing held on August 6  
5 and 7, 2019 before Arbitrator Joseph W. Duffy. Ex. A at ¶ 22.

6 On October 7, 2019, Arbitrator Duffy issued an award which found that UNFI breached  
7 the CBAs by refusing to apply the Movement of Facilities provisions to its transfer of operations  
8 from Tacoma to Centralia. Ex. A at ¶ 22; Ex. B at 19. The award expressly disclaimed deciding  
9 representational questions at the Centralia facility and found that the Unions had not demanded  
10 recognition as exclusive bargaining agents there. Ex. B at 19. Further, the Arbitrator interpreted  
11 the "terms of this contract" referenced in the Movement of Facilities provisions to encompass  
12 economic terms which sustained employees' "standard of living"—such as "wages, hours,  
13 benefits and working conditions"—but not those implicating representational rights such as the  
14 contract's "arbitration provision" or "union security clause." *Id.* To remedy the violation, the  
15 award ordered UNFI to reinstate and make whole laid-off unit members, give all Tacoma  
16 employees the chance to transfer to Centralia, and apply to them the same terms and conditions  
17 they previously enjoyed. Ex. A at ¶ 23; Ex. B at 19-20; Ex. C at ¶ 21; Ex. D at ¶ 21. To date,  
18 UNFI has refused to comply with the Award. Ex. C at ¶ 23; Ex. D at ¶ 23.

## 19 **II. Procedural History**

20 On October 28, 2020, UNFI filed an unfair labor practice charge, alleging that the  
21 Unions' effort to enforce the Award violated Sections 8(b)(1)(A), 8(b)(2), and 8(b)(3) of the  
22 National Labor Relations Act (the Act). The same day, UNFI also filed a complaint in federal  
23 district court for the Western District of Washington under 29 U.S.C. § 185 seeking to vacate the  
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1 award. *See* Miscimarra Decl., Ex. A.<sup>4</sup> On July 29, 2020, Region 19 of the NLRB issued a  
2 Consolidated Complaint in Case Numbers 19-CA-249264<sup>5</sup> and 19-CB-250856. A Notice of  
3 Hearing set a hearing date of March 2, 2021.<sup>6</sup>

4 On January 28, 2021, undersigned counsel emailed counsel for the AGC and UNFI,  
5 inquiring whether the other parties would agree to extend the March 2 hearing date because the  
6 Unions “intend[] to request that the [Acting] General Counsel reconsider issuance of a complaint  
7 in Case Number 19-CB-250856.” *See* Declaration of Danielle Franco-Malone (Franco-Malone  
8 Decl.), Ex. A (Jan. 28-29, 2021 email exchange). The next day, January 29, 2021, counsel for  
9 UNFI responded that UNFI would oppose “the actions” outlined by the Union’s counsel. *Id.* That  
10 same day, the Unions submitted their reconsideration request to AGC Ohr, *see* Br. at App. C.,  
11 and also filed and served on all parties a motion to the Regional Director to extend the hearing  
12 date to give the AGC the opportunity to evaluate the Unions’ request. *See* Jan. 29, 2021 Motion  
13 to Extend Hearing.

14 On February 1, 2021—three days after the Unions submitted their reconsideration request  
15 and motion to extend the hearing (and four days after communicating their intent to do so)—  
16 UNFI filed a motion to sever case 19-CA-249264, to transfer case 19-CB-250856 to the Board,

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17 <sup>4</sup> UNFI promptly moved the district court to stay its own lawsuit pending the outcome of the  
18 instant proceedings. *See* Miscimarra Decl., Ex. F. Judge Richard A. Jones initially denied  
19 UNFI’s motion and the parties proceeded to brief cross-motions for summary judgment. *See id.*,  
20 Ex. I. Upon the issuance of the complaint in this case, UNFI moved for reconsideration of the  
21 denial of the stay, which was supported by an amicus brief filed by the former General Counsel.  
22 *See id.*, Exs. K & N. On November 16, 2020, Judge Jones granted UNFI’s motion for  
23 reconsideration and stayed consideration of the cross-motions for summary judgment pending  
24 the resolution of the Board complaint. *See id.*, Ex. S.

<sup>5</sup> The Complaint in Case No. 19-CA-249264, which the AGC is still actively litigating, concerns  
allegations that UNFI restrained employees’ in the exercise of their statutory rights, in violation  
of Section 8(a)(1) of the Act and refused to bargain with Local 117, in violation of Sections  
8(a)(1) and (5) of the Act. *See* Jul. 29, 2020 Consolidated Complaint ¶¶ 7-8, 10-11.

<sup>6</sup> The Consolidated Complaint was amended twice, on September 11, 2020 and January 29,  
2021.

1 and for summary judgment in Case 19-CB-250856. *See* Feb. 1, 2021 Motion for Summary  
2 Judgment. Also on February 1, 2021, UNFI filed an opposition to the Unions' motion for an  
3 extension of the hearing. Counsel for the AGC did not oppose the Unions' request. On February  
4 3, 2021, counsel for UNFI conveyed to the AGC that the company opposed the Unions' request  
5 to revoke the complaint in Case 19-CB-250856. It also requested and received the opportunity to  
6 present argument to the AGC and other attorneys in the Office of the General Counsel. Appeal of  
7 Regional Director's Order (Br.) at 15, n.55.

8 On February 4, 2021, the Director of Region 19 granted the Unions' request for an  
9 extension and set a new hearing date of April 6, 2021. On February 10, 2021, UNFI filed a  
10 request for special permission to appeal the Regional Director's scheduling order, together with  
11 its appeal. On February 11, 2021, Counsel for the General Counsel requested an extension of  
12 time to reply to UNFI's motion and special appeal. On February 12, 2021, the NLRB Associate  
13 Executive Secretary granted the extension for submitting opposition briefs to UNFI's special  
14 appeal, setting a new response deadline of February 26, 2021 for all parties. The Unions filed an  
15 opposition to UNFI's special appeal on February 26.

16 Meanwhile, on February 24, 2021, the Director of Region 19 withdrew the complaint  
17 against the Unions and dismissed the charge in Case 19-CB-250856, noting that "the Acting  
18 General Counsel, pursuant to his prosecutorial discretion, does not wish to pursue the  
19 prosecution of Case 19-CB-250856." *See* Feb. 24, 2021 Order Withdrawing Complaint.

20 On March 9, UNFI filed a request for special permission to appeal the Regional  
21 Director's order dismissing the charge in Case 19-CB-250856, together with its appeal.

## 22 ARGUMENT

### 23 I. UNFI's Mere Filing of an Omnibus Motion to Sever, Transfer, and for Summary 24 Judgment Did Not Create an Adjudication that Divested the Acting General Counsel of his Prosecutorial Discretion.

1 UNFI tries to circumvent the authority of the AGC and the Regional Director with a  
2 fantastical proposition: that it has already wrested them of their jurisdiction simply by *asking* the  
3 Board to transfer and decide the CB charge on summary judgment, even though the Board has  
4 not yet accepted transfer or issued a notice to show cause, much less had the AGC or Unions had  
5 an opportunity to respond to the motion until now. Unsurprisingly, no authority supports the  
6 notion that a private party to a Board proceeding can supplant the AGC's and Regional  
7 Director's jurisdiction by fiat. Unless and until the Board decides that the CB charge is  
8 appropriate for summary adjudication—which it cannot now do in any event because the  
9 withdrawal of the charge moots UNFI's motion—the AGC retains jurisdiction over the charge.  
10 The AGC had the authority to reassess whether any part of the complaint should go forward to  
11 hearing. The Board should reject UNFI's brazen attempt to impede the AGC's exercise of  
12 prosecutorial discretion by pretending to have created a jurisdictional conflict between the AGC  
13 and the Board.

14 **A. The Act vests the General Counsel with unreviewable discretion to withdraw a**  
15 **complaint prior to hearing.**

16 Section 3(d) of the NLRA gives the General Counsel plenary authority over the  
17 prosecution of complaints: “He shall have final authority, on behalf of the Board, in respect of  
18 the investigation of charges and issuance of complaints...and in respect of the prosecution of  
19 such complaints before the Board.” 29 U.S.C. § 153(d). As the Supreme Court has explained,  
20 Section 3(d) not only grants the General Counsel “unreviewable discretion to file a complaint,”  
21 but also “the same discretion to withdraw the complaint before hearing if further investigation  
22 discloses that the case is too weak to prosecute.” *N.L.R.B. v. UFCW, Local 23*, 484 U.S. 112,  
23 126, 108 S. Ct. 413 (1987). In *Local 23*, the Court specifically rejected the claim that the post-  
24 issuance disposition of a complaint is necessarily adjudicatory because “until a hearing is held

1 the Board has taken no action [and] no *adjudication* has yet taken place.” *Id.* at 125 (original  
2 emphasis). Before the hearing occurs and evidence is entered into the record, “settlement or  
3 dismissal determinations are prosecutorial” and subject to the General Counsel’s unreviewable  
4 discretion. *Id.* at 125-26; *accord Int’l Bhd. of Boilermakers, Local 6 v. N.L.R.B.*, 872 F.2d 331,  
5 334 (9th Cir. 1989) (General Counsel has unreviewable discretion to “withdraw an unfair labor  
6 practice complaint after the hearing has commenced but before evidence on the merits has been  
7 introduced”).

8         The Board recently came to the same conclusion in *AM/NS Calvert*, Case Nos. 15-CA-  
9 244523 and 15-CB-244598, rejecting the employer’s argument that the Regional Director’s  
10 dismissal of the Complaint was invalid because its summary judgment motion was pending and  
11 withdrawal had not been approved by the Board. The Board reaffirmed that, “the Regional  
12 Director has the prosecutorial discretion to withdraw a complaint sua sponte at any time before  
13 the hearing and the exercise of that authority is not subject to Board review.” *Id.*, Unpublished  
14 Order dated February 19, 2021. *See also Sheet Metal Workers Int’l Ass’n, Local Union 28*  
15 *(American Elgen)*, 306 NLRB 981, 982 (1992) (General Counsel’s unreviewable final authority  
16 “includes a purely ‘prosecutorial’ decision to withdraw a complaint, i.e., effectively a dismissal,”  
17 and the point at which “a complaint may be said to have advanced so far into the adjudicatory  
18 process that a dismissal takes on the character of an adjudication” certainly does not occur until  
19 after “the General Counsel has [] introduced evidence in support of the allegations.”) (internal  
20 citations omitted).

21         Consistent with the General Counsel’s statutory authority, the Board’s regulations permit  
22 regional directors—the General Counsel’s delegated agents—to “withdraw[]” complaints  
23 “before the hearing” on their “own motion.” 29 C.F.R. § 102.18.

1 Here, the Regional Director issued the Order withdrawing the complaint allegations  
2 against the Unions and dismissing Charge 19-CB-250856 on February 24, 2021. Undisputedly,  
3 this action occurred well before the rescheduled hearing date of April 6, 2021, and nearly a week  
4 before the original hearing date of March 2, 2021.<sup>7</sup> Under the foregoing authorities, the AGC  
5 possessed unreviewable discretion at that point to decide not to continue to prosecute the CB  
6 charge. The February 24 Order was therefore a lawful and unremarkable exercise of the AGC's  
7 prosecutorial discretion.

8 As with its special appeal of the order rescheduling the hearing date, UNFI does not and  
9 cannot contest the objective sequence of events. Instead, it reprises the same misleading claim—  
10 supported by the same inapposite decisions—that the Board may dictate to the General Counsel  
11 whether a complaint can be withdrawn prior to hearing. March 9, 2021 Br. at 19-21. UNFI tries  
12 to undercut Rule 102.18 and the cases interpreting it, *Local 23* and *American Elgen*, by pointing  
13 to decisions where the Board has prevented the General Counsel from *continuing* a complaint's  
14 prosecution in the face of a proposed settlement *after* the hearing has begun or proceedings have  
15 transferred to the Board. *See UPMC*, 365 NLRB No. 153 at \*2-3, 9-13 (2017) (upholding partial  
16 dismissal of claims against respondent employer, based on employer's offer to guarantee co-  
17 respondent's performance of remedies ordered in connection with latter's proven violations,  
18 despite General Counsel's objection to proposed remedy); *Independent Stave Co.*, 287 NLRB  
19 740, 740-43 (1987) (following transfer of case to Board, granting summary judgment to  
20 respondent employer over General Counsel's objection based on private settlement between  
21 employer and charging parties). But neither case considered, much less disputed, the General  
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23 <sup>7</sup> Thus, even crediting UNFI's claim that the Regional Director should not have rescheduled the  
24 original hearing date, the dismissal of the CB charge would have occurred before the hearing  
opened.

1 Counsel's discretion to *withdraw* allegations *prior to* the hearing.<sup>8</sup> Contrary to UNFI's argument,  
2 the principle that the Board must consider whether a violation is "substantially remedied," Br. at  
3 20, does not apply when, prior to hearing, the General Counsel concludes there is no violation to  
4 remedy. *Local 23*, 484 U.S. at 125-26.

5 The other cases UNFI relies upon are not even remotely relevant because they deal only  
6 with the Board's power to remedy a violation in derogation of a private settlement between the  
7 respondent and charging party or the latter's withdrawal of the original charge, without reference  
8 to the General Counsel's position. *See Robinson Freight Lines*, 117 NLRB 1483, 1484-86 (1957)  
9 (affirming employer's Section 8(a)(1) and (3) violations despite supplemental evidence of post-  
10 charge agreement between union and employer to reinstate employees and withdraw pending  
11 charge); *N.L.R.B. v. Fed. Eng'g Co.*, 153 F.2d 233, 234 (6th Cir. 1946) (rejecting claim that  
12 Board was required to dismiss complaint based on withdrawal of charge by charging union);  
13 *N.L.R.B. v. Prettyman*, 117 F.2d 786, 792 (6th Cir. 1941) (same conclusion, involving settlement  
14 between respondent and charging party).

15 UNFI also attempts to invert the Supreme Court's holding in *Local 23* by recasting its  
16 specific affirmation of the General Counsel's pre-hearing discretion to withdraw complaints as a  
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18 <sup>8</sup> In a footnote, the *UPMC* Board affirmed that the ALJ did not "improperly infringe[] on the  
19 General Counsel's prosecutorial discretion" by accepting the employer's offer to serve as  
20 guarantor over the General Counsel's objection. *UPMC*, 365 NLRB No. 157 at \*3, n.3. The ALJ  
21 distinguished *American Elgen*, relied upon by the General Counsel, on the ground that that case  
22 "involves the General Counsel's discretion to *withdraw*...a complaint after a hearing has opened  
23 but before any evidence has been introduced," whereas the case before him involved the question  
24 of "whether it is appropriate to *dismiss*" an allegation after "19 days of hearing have been held."  
*Id.* at Appendix (ALJ Decision) (original emphasis). The ALJ concluded that, given the extent to  
which litigation had progressed at hearing, the authority to decide the propriety of the proposed  
remedy had shifted from the General Counsel to him. *Id.* *UPMC*'s limitation on the General  
Counsel's discretion to reject a settlement after weeks of hearing in no way restricts—indeed,  
was explicitly contrasted with—his absolute discretion to withdraw a complaint prior to hearing,  
as described in *American Elgen*.

1 denial of any fixed boundary between the General Counsel and Board's authority. Br. at 21-22,  
2 24-25. To do so, UNFI latches onto the decision's prefatory recognition that "[s]ome agency  
3 decisions can be said with certainty to fall on one side or the other of [the  
4 prosecutorial/adjudicatory] line," while between the "extreme[]" cases are those "that might  
5 fairly be said to fall on either side of the division." *Local 23*, 484 U.S. at 125. From this  
6 statement, UNFI infers that "no bright line exists" between prosecutorial and adjudicatory  
7 decisions. Br. at 21, 24-25. Not so. UNFI misleadingly focuses on the Court's general overview  
8 of the issue while ignoring or trying to explain away the substance of its holding that followed.

9 Although the Court observed that, in the abstract, there is no neat conceptual distinction  
10 between prosecutorial and adjudicatory decisions, it acknowledged that the Board had in fact  
11 drawn that line by issuing regulations allocating final authority between the General Counsel and  
12 Board on different kinds of decisions. *Local 23*, 484 U.S. at 123-126. The point *Local 23* was  
13 making was that courts should not "categorize each agency determination" as adjudicatory or  
14 prosecutorial in the first instance, "but rather [] decide whether the agency's regulatory  
15 placement is permissible." *Id.* at 125. When the Court finds that the Board's "regulatory  
16 placement" is permissible, that bright-line demarcation between "prosecutorial" and  
17 "adjudicatory" roles stands. *Id.*<sup>9</sup> Indeed, in its holding, *Local 23* upheld the Board regulation  
18 granting the General Counsel "final authority to dismiss a complaint in favor of an informal  
19 settlement, at least before a hearing begins." *Id.* at 126. This conclusion was compelled by the

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21 <sup>9</sup> In this vein, UNFI obfuscates the object of the Court's deference under *Chevron U.S.A. Inc. v.*  
22 *Natural Resources Defense Council*, 467 U.S. 837, 104 S. Ct. 2778 (1984). UNFI claims that  
23 *Local 23* invites the Board to overrule any exercise of the General Counsel "prosecutorial  
24 discretion" with its own "adjudication," to which the Court will defer. Br. at 21. In actuality,  
*Local 23* invoked *Chevron* when it committed to defer to the Board's *regulatory framework*,  
*Local 23*, 484 U.S. at 125, which is the relevant source for determining when the General  
Counsel or Board exercises final authority. It is the Board's duly promulgated regulations—not  
an ad-hoc decision to ignore them—to which deference is owed. *Id.*

1 Court's approval of the Board's bright-line distinction between pre- and mid-hearing  
2 determinations. *Id.* at 125-26 ("We hold that it is a reasonable construction of the NLRA to find  
3 that until the hearing begins, settlement or dismissal determinations are prosecutorial."). The  
4 Supreme Court thus endorsed Rule 102.18 and expressly recognized "[t]he General Counsel's  
5 unreviewable discretion to file and withdraw a complaint" until the hearing opens. *Id.* at 126.  
6 *Local 23* issued a specific holding about the extent and timing of the General Counsel's  
7 discretion—and not, as UNFI would have it, a repudiation of bright-line rules.

8 **B. The pendency of an undecided motion to transfer and for summary judgment**  
9 **does not create an exception to the General Counsel's pre-hearing prosecutorial**  
10 **discretion to withdraw a complaint.**

11 Unable to marshal any decisional law that would limit the AGC's pre-hearing discretion  
12 to reassess pending charges, UNFI next argues that a previously undiscovered exception to the  
13 general rule exists which applies here. Building off the incorrect premise that the respective  
14 authorities of the General Counsel and Board can vary on a case-by-case basis—as opposed to  
15 being fixed by the Board's reasonable regulations—UNFI urges the Board to distinguish *Local*  
16 *23* in cases where a party moves the Board for summary judgment in an attempt to obviate the  
17 need for a hearing conducted by an ALJ. Br. at 25. In further support of this position, UNFI  
18 seizes on *dicta* from *American Elgen*, which suggests that the General Counsel's discretion to  
19 withdraw a charge *after the hearing opens* may not be completely unreviewable if there is a  
20 "contention that a legal issue is ripe for adjudication on the parties' pleadings alone." *Id.* at 22-23  
21 (quoting *American Elgen*, 306 NLRB at 981). By making such a "contention," UNFI claims, it  
22 has converted an otherwise prosecutorial decision into an adjudicatory one, and thereby escaped  
23 *Local 23's* holding that the General Counsel's pre-hearing decision to withdraw a complaint is  
24 unreviewable. *Id.*

UNFI's proposed "summary judgment motion" exception finds no support in *Local 23*,

1 *American Elgen*, or the Board rules those cases interpret. It also contradicts the premise of  
2 Section 3(d) of the Act, which is that the General Counsel—not private litigants—has “final  
3 authority” in deciding whether and how complaints should be prosecuted. 29 U.S.C. § 153(d).

4 **1. Under its regulations, the Board does not obtain jurisdiction and an**  
5 **adjudication does not begin unless and until it issues an order**  
6 **transferring the case and directing the non-moving party to show cause**  
7 **why summary judgment should not be granted.**

8 UNFI’s radical claim that merely filing a summary judgment motion with the Board  
9 subverts the AGC’s authority is contradicted by the Board’s rules and regulations. Unless and  
10 until the Board accepts transfer of a complaint, the evidentiary hearing will not be cancelled, and  
11 the General Counsel’s authority to withdraw the complaint in advance of it cannot be  
12 extinguished. The mere filing of a summary judgment motion has no legal effect whatsoever.  
13 Only if the Board accepts transfer and issues a notice to show cause will the hearing be  
14 cancelled.<sup>10</sup> But that has not occurred here. The Regional Director’s February 4, 2021 Order  
15 reset the hearing before ALJ Eleanor Laws for April 6, 2021. *See* Feb. 4, 2021 Order. Thus,  
16 UNFI’s premise that this case “[did] not involve a hearing” on the CB charge, Br. at 25, prior to  
17 the Regional Director’s Order withdrawing the complaint against the Unions is false. At all times  
18 prior to the withdrawal of the Complaint on February 24, 2021, and at all times while UNFI’s  
19 motion for summary judgment was pending, there was an evidentiary hearing on the horizon.

20 More specifically, when a party moves the Board to resolve a charge on summary  
21 judgment, it must request that the proceeding in which the charge is to be adjudicated be  
22 transferred to the Board or a member thereof pursuant to Section 102.50. 29 C.F.R. § 102.24(a)  
23 (“All motions for...summary judgment...made prior to the hearing shall be filed in writing with  
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<sup>10</sup> Whether, in that circumstance, Rule 102.18 still applies is an academic question the Board  
need not decide here since the Complaint has now been withdrawn. There is, in any event, good  
reason to believe that it does because the risk of converting Board proceedings into private  
litigation, *see infra*, Section I.B.3, is still present.

1 the Board pursuant to the provisions of §102.50.”). Under Section 102.50, the case does not  
2 transfer to the Board automatically, but only when “the Board deems it necessary in order to  
3 effectuate the purpose of the Act or to avoid unnecessary costs or delay,” in which case it will  
4 “order that such complaint and any proceeding which may have been instituted with respect  
5 thereto be transferred to and continued before it or any member of the Board.” 29 C.F.R. §  
6 102.50 (emphasis added). Thus, the Board must affirmatively order the case to be transferred for  
7 proceedings to come “before” it. *Id.* Notwithstanding the plain language of the rule, UNFI  
8 repeatedly insists that it brought the CB charge “before the Board” by virtue of filing its omnibus  
9 motion. Br. at 11, 14. But in the absence of an order accepting transfer, UNFI’s motion has no  
10 legal effect and the AGC retains jurisdiction over the CB charge. Moreover, the entire thrust of  
11 UNFI’s omnibus motion undercuts its present contention that the CB charge is already “before  
12 the Board.” Could such transfers be self-executed by a charging party, as UNFI now suggests, it  
13 would have been unnecessary for UNFI to request the Board accept transfer, as it did in its  
14 motion. *See* Motion for Summary Judgment at 8 (requesting the Board “order the transfer of  
15 Case 19-CB-250856 for resolution...without a hearing pursuant to Section 102.50”); Brief in  
16 Support of Motion for Summary Judgment at 1, 12, 29 (same). Under its present theory, UNFI’s  
17 motion for summary judgment would have by itself accomplished the transfer. UNFI cannot  
18 usurp the Board’s role in deciding for itself whether to accept transfer of the case.

19 Other Board rules confirm that a private party’s ministerial act of filing a summary  
20 judgment motion does not divest the General Counsel of jurisdiction or create an “adjudication”  
21 before the Board. Rule 102.24(b) states that when the Board decides a proceeding is ripe for  
22 summary adjudication, it will “issue a notice to show cause why the motion should not be  
23 granted.” 29 C.F.R. § 102.24(b). Only once “a notice to show cause is issued, the hearing, if  
24

1 scheduled, will normally be postponed indefinitely.” *Id.* And before that can occur, the  
2 responding parties must be given an opportunity to file briefs opposing the motion at least 21  
3 days before the scheduled hearing “in order to prevent postponement of the hearing.” *Id.* In other  
4 words, in order to take jurisdiction over the matter, the Board must first consider the responding  
5 parties’ opposition briefs and then, if it still deems summary adjudication proper, issue a notice  
6 to show cause. If these things do not happen, the hearing will go forward as scheduled. *See id.*  
7 Were UNFI correct that the Board acquires jurisdiction over a charge the moment a summary  
8 judgment motion is filed and before the Board issues a notice to show cause, it would create an  
9 impossible situation in which the parties proceeded to a hearing before an ALJ while the Board  
10 simultaneously entertained the motion’s merits. That cannot be.

11 In this case, the General Counsel’s and Unions’ opposition briefs were not due until  
12 March 16, 2021—21 days before the rescheduled April 6 hearing. The Board has not issued and,  
13 in light of the withdrawal, can no longer issue, a notice to show cause. Even before the  
14 withdrawal, the Board could not have issued such a notice until it received and considered those  
15 briefs, after March 16. Since a notice never issued, the hearing schedule remained in force, as did  
16 the AGC’s pre-hearing discretion to withdraw the CB charge.

17 Anticipating this problem, UNFI offers a preemptive rebuttal to the reality that the Board  
18 never asserted jurisdiction over this case. *See Br. at 23-24, n.72.* Its various arguments are  
19 unpersuasive.

20 First, UNFI simply quotes Rules 102.24 and 102.50, emphasizing that summary  
21 judgment motions “must be filed in writing with the Board,” *Br. at 23, n.72* (quoting 29 C.F.R. §  
22 102.24) and that “the Board may order that any proceeding ‘be transferred to and continued  
23 before it or any Board Member.’” *Id.* (quoting 29 C.F.R. § 102.50). That the motion must be  
24

1 directed to the Board and that the Board *may* accept transfer is undisputed. What matters, and  
2 what UNFI fails to address, is *when* proceedings transfer to the Board. As Rule 102.50 makes  
3 clear, that occurs only upon the entry of a specific order to that effect.

4 Second, UNFI erects and pummels a strawman, claiming that the Unions believe an  
5 adjudication takes place only when the Board “*decides* a summary judgment motion.” Br. at 23,  
6 n.72 (original emphasis). This is wrong. As explained above and in the Unions’ opposition to  
7 UNFI’s special appeal of the rescheduling order, an adjudication begins when the Board issues  
8 an order accepting transfer of proceedings and directing the non-moving party to show cause  
9 why summary judgment should not be granted. *See supra* at 15-17; Feb. 26, 2021 Opp. to  
10 Special Appeal at Section II.B.

11 Third, UNFI cites both a dictionary definition of “adjudication” as well as *Local 23*’s  
12 definition of the term as it relates to the respective authorities of the General Counsel and Board.  
13 Br. at 23, n.72. However, the latter authority directly undermines the former and illustrates why  
14 UNFI cannot graft the concept of an “adjudication” onto the mere filing and pendency of its  
15 omnibus motion. As UNFI notes, the Supreme Court identifies “adjudications” in this context as  
16 “the *resolution* of contested unfair labor practice cases”—i.e., the evaluation of the statutory  
17 claims on the merits. *Local 23*, 484 U.S. at 125 (emphasis added). But because it did not order  
18 the transfer of the case or direct the Unions to show cause why summary judgment should not be  
19 granted, the Board never took the threshold step of deciding *whether* it would resolve the CB  
20 charge on the merits. Once again, UNFI can account for this deficiency only by conflating its  
21 request for the Board to resolve the since-dismissed CB charge with the Board’s decision to  
22 actually do so. In *Local 23*, the Board specifically rejected the appellant’s argument that  
23 proceedings had assumed an adjudicatory posture because a preliminary “step”—there, the filing  
24

1 of a complaint—had been taken which was necessary to “trigger the Board's adjudicatory  
2 authority.” *Id.* UNFI’s theory to the same effect fares no better.<sup>11</sup>

3 Fourth, UNFI declares circularly that “the General Counsel’s unreviewable discretion  
4 ends when there is adjudication,” Br. at 23, n.72, which simply begs the question, as argued  
5 above, when an “adjudication” before the Board is triggered.

6 Fifth, UNFI contends that even if there was no adjudication before the Board, there was  
7 one before the ALJ because its motion requested as an alternative relief that the ALJ render  
8 summary judgment in its favor. Br. at 24, n.72. This argument collapses immediately because  
9 UNFI’s alternative request is contrary to the Board’s regulations, which require motions for  
10 summary judgment to be filed “with the Board” and which allow only the Board to rule on such  
11 motions pursuant to Rule 102.50. 29 C.F.R. § 102.24(a)-(b). UNFI cannot bootstrap an  
12 “adjudication” onto an *ultra vires* request.<sup>12</sup>

13 In sum, UNFI’s effort to negate the Board’s rules fails. Under those rules, the Board does  
14 not obtain jurisdiction to adjudicate the summary judgment motion unless and until it accepts  
15 transfer and issues a notice to show cause. Neither of those things happened here. As a result, the  
16 AGC and Regional Director retained prosecutorial discretion to withdraw the complaint against  
17 the Unions and dismiss the CB charge.

18 **2. The Board’s recent decision in *AM/NS Calvert* refutes UNFI’s theory that**  
19 **a pending motion to transfer and for summary judgment prevents the**

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20 <sup>11</sup> UNFI’s protestation that the Board’s threshold decision of whether to assert jurisdiction is an  
21 “adjudication” because it involves response briefing and the discretion of the Board, Br. at 24,  
22 n.72, thus misses the point. There is no dispute that a motion to transfer calls for a decision—and  
23 in that limited sense, an “adjudication”—but it is a jurisdictional one. As discussed, the  
24 “adjudication” that limits the General Counsel’s power to act unilaterally begins only when the  
Board or the ALJ takes up the “resolution” of the complaint’s allegations themselves. *Local 23*,  
484 U.S. at 125.

<sup>12</sup> Since UNFI in fact filed its omnibus motion with the Board and not the ALJ, as the rules  
require, there is no evidence that the motion was ever considered by the ALJ.

1                   **withdrawal of a complaint.**

2           As noted above, the Board has recently rejected UNFI's precise argument in the *AM/NS*  
3 *Calvert* decision. Case Nos. 15-CA-244523 and 15-CB-244598. The employer there employed  
4 the same procedural tactics UNFI relies upon here, filing a motion to transfer and for summary  
5 judgment, then arguing that the Regional Director's subsequent withdrawal of the complaint  
6 should be vacated in light of the fact that it had not been approved by the Board. The Board  
7 rejected this argument, and instead found that the Regional Director's dismissal of the complaint  
8 was proper, notwithstanding the pendency of the motions to transfer and for summary judgment.  
9 *Id.*, Order dated February 19, 2021.

10           In addition to baldly disagreeing with the Board's decision, UNFI raises several  
11 unfounded arguments in a footnote in an attempt to diminish or distinguish *AM/NS Calvert*.

12           UNFI rehashes the same baseless theory, debunked above, that *Local 23* disclaims the  
13 existence of a "bright line" between prosecutorial and adjudicatory decisions, so that the Board  
14 can reach a different outcome here. Br. at 22, n.70. Even if this claim were not a blatant  
15 misreading of *Local 23*, *see supra* at 12-14, it would still avail UNFI nothing because it points to  
16 no material differences between the posture of the instant case and the one in *AM/NS Calvert*.

17           Further, UNFI misrepresents the Board's decision in *American Elgen*, claiming that the  
18 case stands for the proposition that the Board can "supersede" the General Counsel's  
19 prosecutorial power whenever there is a "contention that a legal issue is ripe for adjudication on  
20 the parties' pleadings alone." Br. at 22, n.70. UNFI's assertion stretches *American Elgen's dicta*  
21 about adjudication on the pleadings beyond recognition. To begin with, the passage in question  
22 expressly limits its discussion to the facts of the case—"after the hearing on [the complaint] has  
23 opened but before any evidence has been introduced." *American Elgen*, 306 NLRB at 981. It did  
24 not imply any limitation on the General Counsel's authority to withdraw complaints before the

1 hearing opens, and merely reiterated *Local 23* on this score. *Id.* at 982. Moreover, *American*  
2 *Elgen* did not involve a summary judgment motion and the Board did not explain what the effect  
3 of such “contentions” would have on the General Counsel’s authority. When squarely presented  
4 with the question of whether an un-adjudicated motion to transfer and for summary judgment  
5 bars the General Counsel from withdrawing a complaint, the Board answered in the negative.  
6 *AM/NS Calvert, supra.*

7 Finally, UNFI points to supposed differences between this case and *AM/NS Calvert*,  
8 which in fact do not exist. For instance, it claims that the employer in that case conceded that the  
9 Regional Director had “prosecutorial authority” to withdraw the complaint but only disputed  
10 how withdrawal occurred. Br. at 22, n.70. In actuality, *AM/NS Calvert* argued in its Motion for  
11 Clarification that “the Deputy Executive Secretary had no authority to unilaterally pronounce  
12 *AM/NS Calvert*’s Motion for Summary Judgment as ‘moot’” because its summary judgment  
13 motion was still pending before the Board. *AM/NS Calvert* Feb. 3, 2021 Motion to Clarify at 4-  
14 5, ¶ 16 (attached hereto as Appendix A).<sup>13</sup> UNFI and *AM/NS Calvert* thus make the same  
15 discredited arguments. Likewise, UNFI contends that this case is different because the material  
16 facts are all undisputed. Br. at 22, n.70. The Unions contest that the materials facts are  
17 undisputed, *see infra*, Section II.B, but in any case, this is a claim shared with *AM/NS Calvert*,  
18 which argued in both its summary judgment motion and motion for clarification that there were  
19 no disputed material facts to resolve. *See* Appendix A at ¶ 2 (averring that respondent’s answer  
20 “admitted all material factual allegations in the Regional Director’s Complaints”); *AM/NS*  
21 *Calvert* Jan. 21, 2021 Motion to Transfer/for Summary Judgment at 2, 9-10 (attached hereto as  
22 Appendix B).

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24 <sup>13</sup> The exhibits to *AM/NS Calvert*’s motion to clarify have been intentionally omitted.

1            *AM/NS Calvert* is on-point and controls the outcome of UNFI's special appeal, which  
2 must be denied.

3            **3. Permitting the filing of a summary judgment motion to obstruct the**  
4            **General Counsel's withdrawal of a complaint would impermissibly**  
5            **infringe on the General Counsel's authority and convert proceedings into**  
6            **private litigation.**

7            UNFI's proposed "summary judgment motion" exception is also incompatible with the  
8 Act's purposes and if accepted would have dire implications for the law's enforcement.

9            Accepting UNFI's proposed exception would eviscerate the Supreme Court's reasoning  
10 in *Local 23*. In upholding the General Counsel's prerogative to either withdraw or settle cases  
11 prior to hearing, the Court concluded that the same type of prosecutorial judgment involved in  
12 deciding a charge has enough merit to warrant issuing a complaint applies in deciding "that the  
13 case is too weak to prosecute" and the complaint should be withdrawn. *Local 23*, 484 U.S. at  
14 126. Thus, to the same extent the former decision is unreviewable, so too is the latter. *Id.* As the  
15 Court noted, a number of appellate courts have reached the same conclusion. *See id.* (citing  
16 *International Assn. of Machinists & Aerospace Workers v. Lubbers*, 681 F.2d 598, 604 (9th Cir.  
17 1982), *cert. denied*, 459 U.S. 1201, 103 S. Ct. 1185 (1983) (affirming General Counsel's  
18 unreviewable authority to withdraw complaints prior to hearing); *George Banta Co. v. N.L.R.B.*,  
19 626 F.2d 354, 356-357 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080, 101 S. Ct. 862 (1981)  
20 (same); *Local 282, Teamsters v. N.L.R.B.*, 339 F.2d 795, 799 (2d Cir. 1964) (the General  
21 Counsel's "statutory authority in respect of the prosecution of such complaints before the Board  
22 must include the power to determine whether a complaint can be successfully prosecuted and, if  
23 he thinks not, to drop it") (cleaned up)). UNFI's theory that a charging party can overcome the  
24 General Counsel's withdrawal order by petitioning the Board for summary judgment would  
arrogate to a private litigant the power to decide whether a case is strong enough to continue

1 prosecution. This would nullify the General Counsel's withdrawal power and severely weaken  
2 Section 3(d) of the Act because, if accepted, any dissatisfied party anticipating the withdrawal of  
3 a complaint will inevitably move the Board for summary judgment and thereby block the  
4 charge's dismissal, despite the judgment of the statutorily-appointed agent for enforcing the Act  
5 that *no violation* has occurred. Such a self-defeating reading of Section 3(d) is inconsistent with  
6 *Local 23's* respect for the General Counsel's prosecutorial discretion and cannot be accepted.<sup>14</sup>

7 UNFI's theory that a litigant can force the Board to adjudicate a summary judgment  
8 motion concerning a charge that the General Counsel refuses to prosecute would not only imperil  
9 the latter's authority as prosecutor, it would convert the Board into a tribunal over litigation  
10 between private parties, contrary to the Act's purposes. Should the Board ignore the order of  
11 withdrawal and transfer proceedings to itself, as UNFI urges, the AGC would presumably either  
12 take no position on UNFI's motion or else actively oppose it. In either case, only UNFI would be  
13 advocating the imposition of liability on the Unions. This scenario can be understood in one of  
14 ways, each of which is equally repugnant to the Act. In one sense, UNFI would effectively  
15 assume the mantle of prosecutor and enforcer of the Act. But "it is the General Counsel, not  
16 private litigants, whom Section 3(d) of the Act holds responsible for the 'issuance' and  
17 'prosecution' of complaints." *Guerdon Indus., Inc.*, 127 NLRB 810, 817 (1960). In another

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18 <sup>14</sup> UNFI posits a variation on its claim that the filing of a summary judgment motion can forestall  
19 the General Counsel's pre-hearing withdrawal of a complaint. It argues that although *Local 23*  
20 states that "until a hearing is held...no adjudication has yet taken place," here, three  
21 "adjudications" (the parties' federal court cross-motions, UNFI's summary judgment motion,  
22 and the Unions' so-called "summary judgment motion" to the AGC) were already pending. Br. at  
23 21-22. This attempt to wriggle out from under *Local 23* fails. The very passage from *Local 23*  
24 that UNFI purports to distinguish from the instant facts defines "adjudications" in a manner  
inconsistent with UNFI's understanding of the term. Since each of the three motions UNFI cites  
were filed *before* the opening of the fact-finding hearing in this case, they are *per se* not part of  
any "adjudication" before the Board. *Local 23*, 484 U.S. at 125. UNFI's argument thus boils  
down to special pleading to exempt its summary judgment motion from the ambit of *Local 23's*  
definition of "adjudications."

sense, and one which reflects the underlying realities of this case, UNFI would be using a forum before the Board to advance its private, pecuniary interest at the expense of the contractual rights and private, pecuniary interests of the Unions' members. This would "in effect convert the proceeding into a two-party private litigation' (between the respondent and the charging party)." *American Elgen*, 306 NLRB at 982 (quoting *Boilermakers, Local 6*, 872 F.2d at 334). See also *Glomac Plastics, Inc.*, 241 NLRB 348, 348 (1979) ("the Board enforces the statute to implement public rights thereunder and not to adjudicate private disputes"). Such a result would be "inconsistent with Congress's clear intent to create an essentially prosecutorial system of litigation in which the Board enjoys adjudicatory authority and the General Counsel enjoys prosecutorial authority." *California Saw & Knife Works*, 320 NLRB 224, 275 (1995) (quoting *Boilermakers, Local 6*, 872 F.2d at 334).<sup>15</sup> As the Board recognized in *American Elgen*, private parties cannot appropriate the Board's prosecutorial machinery to serve their own ends. *American Elgen*, 306 NLRB at 982. UNFI's attempt to do exactly that here fails.<sup>16</sup>

## **II. UNFI's Tendentious Characterization of the Record in this Proceeding and the Parallel Federal District Court Case Does Not Change the Outcome of its Special Appeal.**

Unable to escape the application of settled law regarding the AGC's exercise of prosecutorial discretion, UNFI resorts to spinning half-truths and outright fabrications about the record in this proceeding and the parallel case before federal district court.

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<sup>15</sup> For this reason, the ALJ in *California Knife* held that "where the Charging Parties' arguments go clearly beyond the reach of the complaint as issued and prosecuted by the General Counsel, the Charging Parties' arguments fail, not on their substantive merits...but on the grounds that only the General Counsel may adopt and include such arguments in a complaint under the Act." *California Knife*, 320 NLRB at 276. Contrary to this decision, UNFI would now undertake not only to surpass the AGC's legal theories, but his causes of action as well.

<sup>16</sup> Indeed, so outlandish is UNFI's attempt to resolve this case on summary judgment that the Unions are unable to find a single instance in the annals of Board case law in which the Board has ruled on, much less granted, a charging party's motion for summary judgment which is actively opposed by the General Counsel.

1 First, it is factually and legally untrue that the Unions filed a “motion for summary  
2 judgment” with the AGC, as UNFI repeatedly claims. The Unions simply requested that the  
3 AGC reconsider the merits of the CB charge and withdraw the complaint against them. This kind  
4 of request is permitted by the Board’s Casehandling Manual (CHM). The Unions neither styled  
5 their request as a summary judgment motion nor is there any reason to believe that the AGC  
6 interpreted it as such. The Act does not provide for the General Counsel to undertake an  
7 adjudication on the merits, as UNFI well understands. UNFI’s effort to equate the Unions’  
8 reconsideration request with its own summary judgment motion is sophistry, plain and simple.

9 Additionally, the Unions never conceded that all material facts concerning the CB charge  
10 are undisputed. While it is true that UNFI’s legal theory was deficient as a matter of law, it  
11 would have also been defeated by several defenses the Unions raised in their Answer to the  
12 Consolidated Complaint, which turn on the underlying facts. Had the CB charge not been  
13 dismissed, the Unions would have been entitled to adduce evidence on these defenses at hearing.  
14 UNFI also misrepresents the nature of the parties’ joint stipulation of facts in the federal action,  
15 which were expressly limited to deciding whether the arbitration award should be confirmed or  
16 vacated. Although partially overlapping, the question of whether the Unions violated the Act  
17 requires proof of additional elements.

18 Finally, UNFI asserts that the Unions improperly initiated a “race” between the AGC and  
19 the Board to determine the outcome of its charge. But it can only make this claim by obscuring  
20 the sequence of events. In reality, it was UNFI that attempted to induce a “race” between the  
21 AGC and Board by moving for summary judgment only *after* the Unions requested the AGC  
22 reevaluate the CB charge.

23 What is more, the legal significance UNFI ascribes to its misrepresentations do not  
24

1 withstand scrutiny and are not germane to the question of the AGC's authority to withdraw a  
2 complaint prior to the commencement of the hearing.

3 **A. The Unions' request to the AGC to reconsider the merits of the CB charge was**  
4 **not a "motion for summary judgment."**

5 Interspersed throughout UNFI's special appeal is the claim that the Unions moved for  
6 "summary judgment" or sought a "disposition on the merits" from the AGC in their January 29,  
7 2021 filing. Br. at 14-17, 26-27. Based on this characterization, UNFI argues that the Unions  
8 sought an "adjudication" from the AGC at the same time it had sought such relief from the  
9 Board. *Id.* at 26-27. The Unions' competing request for "adjudication," the argument continues,  
10 was improper because only the Board can adjudicate the merits of summary judgment motions.  
11 *Id.*

12 UNFI's argument stumbles out of the gate because the record discloses that the Unions  
13 did not move the AGC for "summary judgment." As Appendix C to the special appeal shows, the  
14 Unions "request[ed] reconsideration of the decision to issue a complaint in Case No. 19-CB-  
15 250856" and in support of this request attached copies of its prior position statements to Region  
16 19, as well as copies of the Unions' and UNFI's briefing on summary judgment in the federal  
17 court action. Br. at App. C (Jan. 29, 2021 Letter reproducing correspondence from Danielle  
18 Franco-Malone and Ben Berger to AGC Ohr). The Unions' request was procedurally proper. The  
19 applicable provision of the CHM anticipates that a party may request such relief prior to hearing  
20 and that the Regional Director may act on it. *See* CHM, Section 10275.1 (Withdrawal/Dismissal  
21 of Complaint: Prior to Hearing) ("A complaint may be withdrawn before the hearing by the  
22 Regional Director, *with or without any party's motion.*") (emphasis added).<sup>17</sup>

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23 <sup>17</sup> As UNFI concedes in passing, there is no impropriety in a party communicating with the  
24 General Counsel's office. Br. at 15, n.55 (denying that the Unions' request "constituted any type  
of ethical impropriety"). Indeed, UNFI itself made both written and oral presentations to the

1 That the Unions' request may constitute a "motion" under the CHM does mean it sought  
2 a judgment on the merits. Nowhere in their letter did the Unions ask the AGC for "summary  
3 judgment" of the complaint's allegations against them. Instead, they requested that the AGC  
4 exercise his final authority to decide not to continue prosecuting the complaint at all. As  
5 explained in *Local 23*, the Act distinguishes between the General Counsel's final authority to  
6 decide whether to prosecute a charge and the Board's final authority to adjudicate its merits.  
7 *Local 23*, 484 U.S. at 124 ("Section 3(d) of the NLRA provides that the General Counsel has  
8 'final authority' regarding the filing, investigation, and 'prosecution' of unfair labor practice  
9 complaints. Conversely, when the authority of the Board is discussed (with regard to unfair labor  
10 practice complaints), it is in the context of the *adjudication* of complaints.") (original emphasis).  
11 Thus, the Act does not even provide a mechanism for the General Counsel to adjudicate the  
12 merits of a charge, since it is fundamental to the Act that this role is allocated to the Board. *Id.*  
13 Consistent with his statutory role, the AGC directed the Regional Director to withdraw the  
14 complaint against the Unions and dismiss the CB charge. *See* Feb. 24, 2021 Order Withdrawing  
15 Complaint. The order does not purport to enter a judgment for or against the Unions regarding  
16 the complaint's allegations. *See id.*

17 UNFI elides the distinction between prosecutorial and adjudicatory decisions by  
18 rebranding the Unions' letter request as a summary judgment motion and analogizing it to its  
19 pending motion filed with the Board. It suggests that the letter constitutes a summary judgment  
20 motion because the Unions argued that the charge is insufficient as a matter of law, while on the  
21 flipside UNFI argued to the Board that a finding of a violation follows from allegedly undisputed

22  
23 AGC in an ultimately unsuccessful attempt to persuade him to continue prosecuting the CB  
24 charge. *Id.* Other than mischaracterizing the reconsideration request as an "adjudication," UNFI  
fails to explain why the Unions were not entitled to advance their position that the CB charge did  
not warrant continued prosecution.

1 facts. Br. at 27.<sup>18</sup> This is a false equivalence. The adjudicatory/prosecutorial dichotomy does not  
2 depend on the type of legal argument employed by the party subject to the Board's or General  
3 Counsel's final authority. It depends on the character of the decision issued. A decision to  
4 investigate a charge, to file and prosecute a complaint, or to withdraw or settle a complaint  
5 before hearing is prosecutorial. *Local 23*, 484 U.S. at 124, 126 ("the General Counsel has 'final  
6 authority' regarding the filing, investigation, and 'prosecution' of unfair labor practice  
7 complaints", "to withdraw the complaint before hearing if further investigation discloses that the  
8 case is too weak to prosecute", and to "to dismiss a complaint in favor of an informal  
9 settlement...before a hearing begins"). Meanwhile, a decision resolving the merits of a complaint  
10 is adjudicatory. *Id.* at 125 ("the resolution of contested unfair labor practice cases is  
11 adjudicatory"). Regardless of why the Unions believed, and the AGC found, that the CB charge  
12 was too weak to merit continued prosecution, it is indisputable that the February 24 Order  
13 effected the withdrawal of the complaint and dismissal of the charge, not a judgment on the  
14 merits. On the other hand, by its own admission, UNFI sought entry of a judgment finding the  
15 Unions liable for violating the Act. The different procedural paths of the two requests reflect the  
16 different kinds of final authority to which the parties appealed.

17 Accordingly, the Board should ignore UNFI's false claim that the Unions sought or  
18 received a "summary judgment" determination from the AGC.

19 **B. Because the Unions did not stipulate that the facts material to the CB charge are**  
20 **undisputed, there would have been numerous grounds to preclude summary**  
21 **judgment.**

22 UNFI contends that the CB charge should have been resolved on summary judgment  
23 because, supposedly, "the Unions had stipulated in the separate Lawsuit, regarding precisely the

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24 <sup>18</sup> Following UNFI's logic, the former General Counsel's decision to file a complaint in the first  
place was also impermissibly "adjudicatory" because it followed the submission of position  
statements by UNFI and the Unions.

1 same alleged violations of the Act, that no factual questions existed and these alleged violations  
2 were appropriate for resolution by summary judgment....” Br. at 23.<sup>19</sup> UNFI’s focus on the  
3 evidence adduced in the federal case is a non-sequitur because, regardless of whether the  
4 material facts surrounding the CB charge are undisputed, the AGC has already determined that  
5 its legal theory is deficient and does not warrant further prosecution. The Regional Director’s  
6 order withdrawing the complaint and dismissing the CB charge thus renders the sufficiency of  
7 the factual record for purposes of summary judgment moot. Nonetheless, in an abundance of  
8 caution, the Unions correct the record regarding the facts that are disputed in this case.

9 As a threshold matter, a stipulation as to facts in one proceeding does not preclude the  
10 introduction of additional evidence on the same subject in another proceeding. *See* 83 C.J.S.  
11 Stipulations § 92 (2021) (“a stipulation of an agreed statement of facts, to be used in the trial of a  
12 cause...does not prevent the introduction of further evidence at a second trial”); *Shell Oil Co. v.*  
13 *United States*, 130 Fed. Cl. 8, 79 (2017), *aff’d*, 896 F.3d 1299 (Fed. Cir. 2018) (parties’  
14 stipulation from earlier trial admissible but not binding). For this reason, the Unions do not  
15 concede that the stipulated evidence which govern the federal action is conclusive of the facts in  
16 this case. Had the complaint against the Unions gone forward, every fact not admitted<sup>20</sup> would  
17 have been subject to proof at hearing.

18 Moreover, even if the stipulated evidence from the federal action could be imported  
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20 <sup>19</sup> In making this claim, UNFI admits that “nobody believed, at any time, that a ‘hearing’ was  
21 warranted regarding the Unions’ alleged violations of the Act.” Br. at 26. Yet UNFI has specially  
22 appealed to this body to vacate the Regional Director’s February 4, 2021 Order rescheduling the  
23 hearing date and to reinstate the original hearing date. *See generally* UNFI’s Feb. 10, 2021  
24 Special Appeal. In this moment of candor, UNFI essentially admits that its still pending special  
appeal is baseless, since it does not believe a hearing necessary, and was filed for no other  
purpose than to obstruct the AGC’s ability to review the merits of the CB charge.

<sup>20</sup> Incredibly, UNFI filed its motion for summary judgment *before* the Unions had even filed an  
Answer in the case.

1 wholesale to this case, summary judgment would still have been inappropriate. Contrary to  
2 UNFI's suggestion, the parties' Joint Status Report in the federal lawsuit did not stipulate to facts  
3 concerning the Unions' "alleged violations of the Act" but to issues relevant to the enforceability  
4 of the arbitration award in the "liability phase" of the Section 301 lawsuit. *See* Miscimarra Decl.,  
5 Ex. E at 4-5 (Jan. 24, 2020 Joint Status Report).<sup>21</sup>

6 This is an important distinction because, while the facts relevant to the first issue overlap  
7 with the second, they are definitely not identical. As one of its defenses to the award's  
8 enforcement, UNFI argued that the award violated a public policy embodied in the Act. *See*  
9 Miscimarra Decl., Ex. A at ¶ 24. Without a doubt, that defense incorporated the central theory of  
10 UNFI's meritless CB charge—namely, that allowing Tacoma bargaining unit members to  
11 transfer to the new Centralia facility and enjoy their previously negotiated contractual rights  
12 somehow "imposed" union representation on a bargaining unit in the second location and  
13 discriminated against other employees there. *Id.*<sup>22</sup> But even if UNFI succeeds in vacating the  
14 award in federal court, it will not have established that the Unions violated Sections 8(b)(2) or  
15 (3) here.<sup>23</sup> Whether the award in and of itself is contrary to the Act is a separate and distinct  
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17 <sup>21</sup> The parties agreed to bifurcate proceedings in the federal action between liability and damages  
18 phases. *See id.*

19 <sup>22</sup> Whether the complaint issued by the former General Counsel adopted this or a different legal  
20 theory is impossible to say because the Consolidated Complaint did not identify the basis for  
21 concluding that the Unions sought to represent bargaining units at the Centralia facility or  
22 discriminate against employees on the basis of union affiliation. *See* Jul. 29, 2020 Consolidated  
23 Complaint ¶ 9(g)-(i).

24 <sup>23</sup> Moreover, the federal district court had a sufficient record to confirm the arbitration award and  
reject UNFI's public policy grounds for vacating the award in light of the incredible deference  
given to labor arbitration awards, and the narrowness of the exception allowing courts to vacate  
awards contrary to public policy. *Ariz. Elec. Power Co-op, Inc. v. Berkeley*, 59 F.3d 988, 998  
(9th Cir. 1995) ("[C]ourts should be reluctant to vacate arbitral awards on public policy  
grounds."). The Unions thus had no need to raise the affirmative defenses they did in their  
Answer because the Award was subject to confirmation without consideration of those  
affirmative defenses.

1 question from whether the Unions committed unfair labor practices by seeking to enforce it. The  
2 latter implicates prima facie elements and affirmative defenses that are not at issue in the federal  
3 lawsuit. The Unions timely raised these issues in their Answer to the Consolidated Complaint.  
4 *See* Feb. 3, 2021 Answer. Accordingly, they were entitled to prove the facts underlying these  
5 defenses at hearing, thereby precluding summary judgment. *See Frate Serv., Inc.*, 255 NLRB  
6 163, 164 (1981) (denying summary judgment because respondent answered “allegations, and, in  
7 doing so, has denied the commission of any unfair labor practices, *has alleged affirmative*  
8 *defenses, and has thereby raised litigable issues*”) (emphasis added).<sup>24</sup> The following list  
9 provides just a few examples of the legal issues and associated facts that were not part of the  
10 stipulation in the federal lawsuit:

- 11 • Board case law is clear that a union does not violate the Act by filing a grievance or  
12 enforcing an arbitration award involving a question concerning representation unless the  
13 grievance or award is inconsistent with an existing Board order or was pursued for an  
14 illegal or retaliatory purpose. *See Safeway, Inc.*, 368 NLRB No. 15 (2019) (“a  
15 determination on whether a party violates the Act through the grievance arbitration  
16 procedure is analyzed under the framework of the Supreme Court's decision in *Bill*  
17 *Johnson's...and BE & K Construction...*, which note that a grievance will not be deemed  
18 unlawful unless it is baseless, filed with a retaliatory motive, or has an illegal objective”);

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19 <sup>24</sup> *See also Southport Lumber Co.*, 368 NLRB No. 88 at \*2 (2019) (“genuine issue of material  
20 fact exists, and a respondent is entitled to a hearing, if there are credibility issues to be resolved  
21 or if the respondent denies the existence of an element of the 8(b)(4)(D) violation, either directly  
22 *or by raising an affirmative defense*”) (citing *Grazzini Bros.*, 315 NLRB 520, 521 (1994))  
23 (emphasis added); *Hawkins & Sons*, 294 NLRB 166, 167 (1989) (similar); *Custom Contracting*,  
24 292 NLRB 792, 792-93 (1989) (denying summary judgment because respondent raised material  
facts related to affirmative defense that employer did not meet statutory definition of  
“employer”); *F.W. Woolworth Co.*, 258 NLRB 1287, 1287-88 (1981) (denying summary  
judgment because respondent raised material facts related to affirmative defense that charging  
party union was not successor to union which employees elected).

1        *Warkwick Caterers*, 282 NLRB 939, 940-41 (1987) (dismissing 8(b)(1)(A), (2), and (3)  
2        charges “because the question of representation had not been previously determined by  
3        the Board” and so “at that point, it was not unreasonable for the Union to continue to  
4        maintain its position on the single-employer and accretion issues and attempt to have an  
5        arbitrator resolve the dispute”).<sup>25</sup> The Unions would have been entitled to elicit evidence  
6        at hearing that no prior determination had issued on a QCR and that they had no unlawful  
7        or retaliatory purpose in enforcing the award, as they allege in their Answer. *See* Ans. at  
8        5 (Seventh Affirmative Defense).

- 9        • In order to establish that the Unions were seeking recognition as bargaining agents at the  
10        Centralia facility, the AGC would have had to prove that the “union has made a claim for  
11        recognition” with respect to a bargaining unit there. *See ADT, LLC*, 365 NLRB No. 77 at  
12        \*4 (2017) (election petition dismissed because no evidence union sought to represent unit  
13        of new employees at merged facility). The Unions contend that they never made such a  
14        claim. *See* Ans. at 5 (Fifth Affirmative Defense). Whether the Unions made such a claim  
15        was not part of the stipulated material and the Unions would have been entitled to put on  
16        evidence on this point as well.
- 17        • To the extent the Unions were found to have sought recognition as bargaining agents, the  
18        Unions would have shown that, but for UNFI’s unlawful refusal to transfer them, the  
19        Tacoma unit employees would have constituted majorities of appropriate units at the

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20        <sup>25</sup> *See also Ida Cal*, 289 NLRB 924, 925 (1988) (dismissing 8(b)(4) charge where “the question  
21        whether owner-operators are employees turns on the facts of each case and had not yet been  
22        determined through an adjudicatory process,” and thus at the time “the Respondent had a  
23        legitimate object in seeking a resolution of the issue through grievance arbitration and through a  
24        Section 301 lawsuit”); *Brink Constr.*, 291 NLRB 437, (1998) (dismissing 8(b)(1) charge and  
      finding union’s lawsuit to compel continued recognition “had a lawful object” because its theory  
      “was reasonable and raised a bona fide contractual issue” and “[b]ecause there had been no prior  
      determination of that question” by the Board).

1 Centralia facility. *See* Ans. at 5 (Sixth Affirmative Defense). In those circumstances, the  
2 Act would have entitled the Unions to presumed majority support, recognition, and  
3 maintenance of the existing contracts. *Gitano Grp., Inc.*, 308 NLRB 1172, 1175, n.20  
4 (1992) (“If...former bargaining unit employees would constitute a majority of the  
5 employees at the new facility but for the employer’s unlawful refusal to transfer those  
6 employees to the new facility, or where an employer unlawfully refuses to hire them at  
7 the new facility, we will find that the union’s majority status presumptively would have  
8 continued at the new facility.”); *Westwood Import Co.*, 251 NLRB 1213, 1215-16 (1980),  
9 *enf’d* 681 F.2d 664 (9th Cir. 1982) (same). To prove this defense, the Unions would have  
10 been entitled to adduce evidence on the relative number of employees working at the  
11 Tacoma and Centralia facilities, as well as the number of Tacoma employees who would  
12 have accepted transfers—both subjects excluded from the materials in the parties’  
13 stipulation.

14 This is but a sampling of the facts underpinning the Unions’ defenses, *see generally* Ans.  
15 at 5, which would have precluded summary judgment had the AGC not withdrawn the complaint  
16 against the Unions. As a result, UNFI’s protestation about the stipulated evidence from the  
17 federal action is not just moot, but factually and legally wrong.

18 **C. UNFI, not the Unions, launched a “race” to obtain determinations from different**  
19 **authorities.**

20 UNFI accuses the Unions of creating a “race” to resolve the CB charge by appealing to  
21 the AGC to “discontinue the Board’s adjudication of the summary judgment claims...” Br. at 3,  
22 11-12. The truth is precisely the opposite. The Unions’ request for the AGC to reconsider the CB  
23 charge and accompanying motion to extend the hearing date *preceded* UNFI’s summary  
24 judgment motion. Only when it learned of the Unions’ requests did UNFI hurry to file its

1 summary judgment motion with the Board. To the extent there was a “race” to resolve the CB  
2 charge, it was the product of UNFI’s transparent attempt to obstruct the AGC’s exercise of  
3 prosecutorial discretion, which was already underway, through the filing of a meritless summary  
4 judgment motion.

5 On January 28, 2021, undersigned counsel emailed counsel for the AGC and UNFI,  
6 inquiring whether the other parties would agree to extend the March 2 hearing date because the  
7 Unions “intend[] to request that the General Counsel reconsider issuance of a complaint in Case  
8 Number 19-CB-250856.” *See supra* at 7. The next day, January 29, 2021, counsel for UNFI  
9 responded that UNFI would oppose “the actions” outlined by the Union’s counsel. *Id.* That same  
10 day, the Unions submitted their reconsideration request to AGC Ohr, *id.*, and also filed and  
11 served on all parties a motion to the Regional Director to extend the hearing date to give the  
12 AGC the opportunity to evaluate the Unions’ request. *Id.*

13 On February 1, 2021—three days after the Unions submitted their reconsideration request  
14 and motion to extend the hearing (and four days after communicating their intent to do so)—  
15 UNFI filed its motion for summary judgment with the Board. *Id.* at 7-8. At no point prior to  
16 February 1 did UNFI announce that it intended to forego the hearing before the ALJ and seek  
17 immediate resolution by the Board. *Cf. id.*

18 The sequence of events is enough to illustrate UNFI’s gamesmanship. It is telling that  
19 UNFI took no action to move for summary judgment until *after* former General Counsel Robb  
20 had been removed, and the Unions had requested that the AGC reconsider the merits of the  
21 complaint in this case. Clearly, UNFI’s motion was motivated by procedural maneuvering rather  
22 than a genuine belief that the case was appropriate for summary judgment.

23 **III. The Order of Withdrawal Does Not Impugn the Board’s Neutrality, Although**  
24 **Continuing to Prosecute the Former General Counsel’s Novel Theory Would.**

1 UNFI contends that the Regional Director's February 24 Order is improper because it  
2 allegedly has no basis other than to accommodate the Unions' interest in terminating the  
3 prosecution of the CB charge and because the motion to extend the hearing date supposedly  
4 described the Unions' request "in blatantly political terms." Br. at 27-29. These critiques merely  
5 regurgitate UNFI's argument with respect to its special appeal of the rescheduling order, miss the  
6 mark for the reasons stated in the Unions' opposition to that appeal, and fail to acknowledge that  
7 the CB charge was inconsistent with Board law.

8 **A. The Unions permissibly requested that the AGC reconsider the CB charge and**  
9 **the AGC was not obligated to prosecute the complaint against them merely**  
10 **because a complaint had previously issued.**

11 UNFI condemns the Unions for daring to ask for a reevaluation of the CB charge after the  
12 former General Counsel investigated it, consulted the Division of Advice, and directed Region  
13 19 to issue a complaint. Br. at 27-28. But UNFI simply assumes, citing no authority, that a  
14 respondent is barred from requesting reconsideration of a complaint filed against it, and that the  
15 General Counsel is obligated to prosecute it once issued, both of which are untrue. As explained  
16 above, the CHM permits parties to move for the withdrawal a complaint before hearing. *See*  
17 *supra* at 26. Here, the Unions moved the AGC to reevaluate the complaint's allegations against  
18 them prior to the scheduled hearing because the complaint's theory is inconsistent with Board  
19 law. Exercising his prosecutorial discretion, the AGC reviewed the materials submitted by both  
20 parties and, after weighing them, directed the Regional Director to withdraw the portion of the  
21 Consolidated Complaint encompassing the CB charge.

22 UNFI's position that the AGC must prosecute the complaint through hearing because the  
23 former General Counsel directed the issuance of the complaint cannot be reconciled with the  
24 General Counsel's and Regional Director's prosecutorial discretion, as evinced by Section 3(d)  
of the Act, nor with Rule 102.18 of the Board's regulations and Section 10275.1 of the CHM,

1 which expressly contemplate that complaints will be withdrawn prior to hearing. *See supra*, Sec.  
2 I.A. The reality is that withdrawals of complaints are a periodic feature of Board litigation, not  
3 unprecedented events, as UNFI suggests.<sup>26</sup> That UNFI, as the charging party with respect to the  
4 CB charge, labels the Unions the “wrongdoers” and circularly assumes the truth of its allegations  
5 does not preclude the Unions from exercising their right under the CHM to seek review of the  
6 initial merits determination or prevent Board officers from considering the petition.<sup>27</sup> Since  
7 nothing compelled the AGC to continue prosecuting a charge he deemed weak or meritless, the  
8 order was valid and does not impugn the Board’s neutrality.

9 **B. The Unions’ request that the AGC decline to adopt his predecessor’s novel**  
10 **interpretation of the Act does not call for a politically-motivated decision, but an**  
11 **independent assessment of the Act’s meaning.**

12 As to UNFI’s second point, there is nothing “political” in the Unions’ recognition that the  
13 recently-appointed AGC may interpret the Act differently from his predecessor, as each General  
14 Counsel generally does. Indeed, former General Counsel Robb’s own construction of the Act led  
15 him shortly after his appointment to withdraw complaints set for hearing under analogous  
16 circumstance. *See e.g. Honeywell Int’l Inc.*, Case No. 03-CA-176218, Jan. 4, 2018 Order  
17 Withdrawing Complaint. Here, the Unions reasonably asked the AGC to reconsider pursuing a  
18 novel interpretation of the Act that contradicted settled precedent and which the judge in the  
19 companion federal court action has already repudiated by rejecting the notion that the Unions’

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20 <sup>26</sup> When a regional director withdraws a complaint, the Board’s rules provide a process for the  
21 charging party to seek review with the Office of Appeals. *See* 29 C.F.R. § 102.19. Notably,  
22 UNFI has chosen to avail itself of this process, while at the same decrying the withdrawal order  
23 as *ultra vires* and demanding immediate intervention by the Board. *See* March 12, 2021  
24 Acknowledgement of Appeal (attached hereto as Appendix C).

<sup>27</sup> Given that UNFI instituted its ULP charge solely to insulate its decision to lay off all of its  
Tacoma facility employees and prevent them from exercising their contractual transfer and  
maintenance of benefit rights that were affirmed at arbitration—self-interested actions from  
which unit members continue to suffer real world harm—it is disingenuous for UNFI to cast  
itself as the guarantor of employee rights to be free from coercion. *See* Br. at 28.

1 grievance or the award involved any representational issues. *See United Nat. Foods, Inc. v. Int'l*  
2 *Bhd. of Teamsters*, No. 2:19-CV-01736-RAJ, 2020 WL 4193385, at \*2 (W.D. Wash. July 21,  
3 2020) (“Whether Section 1.01.2 applies under the current circumstances is a contractual matter  
4 over which the Court has primary jurisdiction...[T]he Unions have made no attempt to represent  
5 any employees at the Centralia facility”), *on reconsideration, sub nom.*, No. 2:19-CV-01736-  
6 RAJ, 2020 WL 6709634 (W.D. Wash. Nov. 16, 2020) (staying case in light of issuance of since-  
7 withdrawn complaint).

8         In the few instances where the General Counsel has actually brought a complaint on  
9 allegations even remotely analogous to UNFI’s theory, the Board has found no statutory  
10 violation. *See Anheuser-Busch*, 296 NLRB 1025, 1027-29 (1989) (cross-facility bumping rights  
11 retained in individual agreements following employers’ withdrawal from multiemployer unit  
12 were enforceable “contractual vestiges of the multiemployer relationship” despite fact that  
13 multiemployer “unit has long since ceased to exist for contract bargaining purposes”); *Miller*  
14 *Brewing*, 296 NLRB 1030, 1032-33 (1989) (similar); *Safeway, Inc.*, *supra* (even where, contra  
15 instant facts, union claimed to continue to represent former unit members at merged facility, it  
16 did not violate Section 8(b) by filing grievance to import contract rights to new location). *See*  
17 *also PACE Local 60807 (C.K. Witco)*, 28 NLRB AMR 38020, Case 33-CB-3689 (May 31, 2000)  
18 (directing region to dismiss charge absent withdrawal, where employer alleged union  
19 inappropriately attempted to merge two separate units, in contravention of a previous unit  
20 clarification proceeding, by filing a grievance over members’ contractual right to bid on jobs  
21 across the two facilities); *Teamsters Local 863 (East Coast Distributors & Benchmark*  
22 *Distributors)*, 34 NLRB AMR 41, Case 4-CB-9674/5 (Oct. 31, 2006) (union did not violate  
23 Section 8(b) by enforcing arbitration award which found two nominally distinct entities were in  
24

1 fact single employer that was obligated to allow employees to transfer to new facility and apply  
2 CBA terms to transferees there); *Teledyne Indus., Inc.*, Case 30-CB-2389, 1986 WL 65493  
3 (N.L.R.B.G.C. 1986) (union's attempt to enforce preferential hiring rights between different  
4 units of a single employer was lawful); *General Motors Corp. & Saturn Corp.*, Case 7-CA-  
5 24872, 1986 WL 620213 (N.L.R.B.G.C. 1986) (memorandum requiring new facility to be  
6 staffed by union-represented employees from other locations lawful). The AGC was well within  
7 his right to decline to adopt his predecessor's decision to attempt to aggressively push the law in  
8 a new direction.

9 While UNFI complains that allowing the AGC to reassess the former General Counsel's  
10 decision to issue complaint in this case would interfere with even-handed enforcement of the  
11 Act, precisely the opposite is true. The initial decision to issue a complaint against the Unions in  
12 this case for seeking to enforce contractual rights in a manner consistent with decades of Board  
13 and judicial precedent was what casted doubt on the even-handedness of the former General  
14 Counsel's enforcement of the Act. The decision to withdraw the complaint and to cease pursuing  
15 a dramatically novel interpretation of the Act helps to restore faith in the independence of the  
16 General Counsel's office.

17 **IV. UNFI's Challenge to the Validity of the Acting General Counsel's Appointment is**  
18 **Without Merit and Should Be Disregarded.**

19 UNFI argues that § 3(d) of the Act prevents the President's removal of former General  
20 Counsel Robb prior to the expiration of Mr. Robb's four-year term, and therefore, that President  
21 Biden lacked the authority to appoint Mr. Robb's successor, Peter Ohr, as Acting General  
22 Counsel. Br. at 30-31. UNFI's attack on President Biden's action is irrelevant to the validity of  
23 the Regional Director's February 24 Order because, regardless of the individual occupying the  
24 office, the AGC's decision not to continue prosecuting a complaint is not reviewable. In any

1 event, UNFI misconstrues the plain language of the Act, which does not impose a limitation on  
2 the President's authority to remove the General Counsel. The Act's plain language shows that  
3 Congress made a deliberate choice not to include for cause removal protection when it created  
4 the General Counsel position. Where Congress does not explicitly include for cause removal in a  
5 statute, the default rule is that the President may remove an executive officer without cause. That  
6 is the case here, where nothing in the text of Section 3(d) limits the President's ability to remove  
7 the General Counsel. Even if it did, such a restriction would fall outside the few discrete  
8 circumstances the Supreme Court has found Congress may constrain the President's ability to  
9 remove executive officials.

10 **A. The propriety of President Biden's removal of former General Counsel Robb is**  
11 **not properly before the Board where the action complained of is an**  
12 **unreviewable decision to withdraw a complaint.**

13 The Board is not properly presented with the question of whether President Biden could  
14 remove former General Counsel Robb because the vehicle UNFI would use to obtain an answer  
15 to that question—an appeal of the AGC's decision to withdraw the complaint—is not subject to  
16 review by the Board for that or any other reason. This is in contrast to previous scenarios, in  
17 which the validity of a Board officer's authority was challenged by appealing a final decision on  
18 the merits affecting persons or entities. In that situation, the officer's affirmative exercise of  
19 authority raises questions ripe for review as to their authority. Here, in contrast, UNFI seeks to  
20 review the AGC's decision *not* to act by continuing to prosecute a case.

21 UNFI declares that the Regional Director's February 24 Order "places at issues the  
22 appropriateness of having an 'acting' General Counsel appointed following the January 20, 2021  
23 removal of General Counsel Peter Robb." Br. at 30. This is apparently because the Order cites  
24 the AGC's desire not to continue prosecuting the CB charge. *Id.* UNFI's conclusion does not  
follow from the content of the order. As an exercise of prosecutorial discretion, the order

1 withdrawing the complaint “is not subject to review by the Board or by a court.” *Lubbers*, 681  
2 F.2d at 603; *George Banta*, 626 F.2d at 356; *American Elgen*, 306 NLRB at 982 (“the General  
3 Counsel retains unreviewable authority under Section 3(d) to withdraw the complaint  
4 allegations” until evidence is introduced at hearing). UNFI cites no authority for the proposition  
5 that a decision which is otherwise unreviewable suddenly becomes so because the office of the  
6 General Counsel is occupied by a new person.

7 By challenging the former General Counsel’s removal, UNFI essentially asks the Board  
8 to endorse its counterfactual speculation that had General Counsel Robb remained in office, the  
9 CB charge would have been prosecuted and resulted in a decision imposing liability on the  
10 Unions. There is no precedent for the Board to entertain such an appeal.

11 Although UNFI likens this case to other instances of improperly appointed Board officers  
12 or erroneous personnel decisions, Br. at 4, the posture of those decisions was very different. In  
13 each, the respondent petitioned for review of a final decision by the Board imposing liability and  
14 issuing an order. See *N.L.R.B. v. SW General, Inc.*, 137 S. Ct. 929, 937 (2017); *N.L.R.B. v. Noel*  
15 *Canning*, 573 U.S. 513, 520, 134 S. Ct. 2550 (2014); *New Process Steel, L.P. v. N.L.R.B.*, 560  
16 U.S. 674, 678, 130 S. Ct. 2635 (2010). Those cases did not involve a mere discretionary  
17 prosecutorial decision but rather an actual adjudication of the merits. Here, the Board has no  
18 occasion to review an adjudication and thus no basis to consider the lawfulness of the former  
19 General Counsel’s removal.

20 **B. The plain language of Section 3(d) imposes a four-year term limit but does not**  
21 **constrain the President’s ability to remove the General Counsel.**

22 To the extent the Board considers the removal of former General Counsel Robb and the  
23 appointment of AGC Ohr as properly before it, nothing in the plain language of the NLRA  
24 insulates the General Counsel from removal by the President. Section 3(a) of the Act establishes

1 the Board and states that the Board's five members "shall be appointed for terms of five years  
2 each." 29 U.S.C. § 153(a). It also says explicitly that: "Any member of the Board may be  
3 removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office,  
4 but for no other cause." *Id.* This for cause removal provision for Board members was included in  
5 the Wagner Act. Pub. L. No. 74-198, § 3(a), 49 Stat. 449, 451 (1935). The General Counsel  
6 position was not included in the for cause removal provisions of the Act. Instead, Congress  
7 created the role of the General Counsel as part of the Taft-Hartley Act. Labor Management  
8 Relations Act of 1947, Pub. L. No. 80-101, tit. I, § 101, 61 Stat. 136, 139 (adding § 3(d) to the  
9 Act). Section 3(d) states: "There shall be a General Counsel of the Board who shall be appointed  
10 by the President, by and with the advice and consent of the Senate, for a term of four years." 29  
11 U.S.C. § 153(d). Congress did not include for cause removal protection for the General Counsel,  
12 as it did in Section 3(a) for Board members. *Id.* If Congress had wanted the General Counsel to  
13 be similarly protected from removal, it would have said so explicitly.

14 That drafting choice alone ends the argument. "Where Congress uses certain language in  
15 one part of a statute and different language in another, it is generally presumed that Congress  
16 acts intentionally." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) (citing  
17 *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also, e.g., Me. Cmty. Health Options v.*  
18 *United States*, 140 S. Ct. 1308, 1323 (2020) ("This Court generally presumes that when Congress  
19 includes particular language in one section of a statute but omits it in another, Congress intended  
20 a difference in meaning.") (cleaned up) (citing *Digit. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767,  
21 777 (2018)); *Loughrin v. United States*, 573 U.S. 351, 358, 134 S. Ct. 2384 (2014) (same). UNFI  
22 does not explain why, if Congress intended the General Counsel to be removable only for cause,  
23 it would not apply the same or similar language that it applied previously to Board members in  
24

1 Section 3(a) to the General Counsel in Section 3(d). This omission demonstrates that Congress  
2 did not intend the General Counsel to be removable only for cause.

3 The Supreme Court has stated both recently and repeatedly that it is “the general rule that  
4 the President possesses ‘the authority to remove those who assist him in carrying out his duties.’”  
5 *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2198 (2020) (quoting *Free*  
6 *Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513-14, 130 S. Ct. 3138 (2010)).  
7 “Since 1789, the Constitution has been understood to empower the President to keep  
8 [subordinate] officers accountable—by removing them from office, if necessary.” *Free Enter.*  
9 *Fund*, 561 U.S. at 483; *Myers v. U.S.*, 272 U.S. 52, 117, 47 S. Ct. 21 (1926) (“[I]n the absence of  
10 any express limitation respecting removals,...as his selection of administrative officers is  
11 essential to the execution of the laws by him, so must be his power of removing those for whom  
12 he cannot continue to be responsible.”). “Without such power, the President could not be held  
13 fully accountable for discharging his own responsibilities” under the Constitution. *Free Enter.*  
14 *Fund*, 561 U.S. at 514.

15 Even if Congress *had* chosen to limit the President’s ability to remove the General  
16 Counsel, which it did not, such a limitation would unconstitutionally impede the President’s  
17 ability to remove executive officers. The Supreme Court has recognized only “two exceptions to  
18 the President’s unrestricted removal power,” *Seila Law*, 140 S. Ct. at 2198, and both require  
19 Congress to grant tenure protections to certain categories of officials in clear terms in order to  
20 defeat the “general rule” that the President may remove executive officials. *Id.* See also  
21 *Humphrey’s Executor v. United States*, 295 U.S. 602, 632, 55 S. Ct. 869 (1935) (“Whether the  
22 power of the President to remove an officer shall prevail over the authority of Congress to  
23 condition the power by fixing a definite term and precluding a removal except for cause will  
24

1 depend upon the character of the office[.]”). The first exception to the general rule allowing the  
2 President to remove executive officials and permitting Congress to give for cause removal  
3 protections is for “a multimember body of experts, balanced along partisan lines, that performed  
4 legislative and judicial functions and was said not to exercise any executive power.” *Seila Law*,  
5 140 S. Ct. at 2199; *see also Wiener v. U.S.*, 357 U.S. 349, 356, 78 S. Ct. 1275 (1958) (applying  
6 *Humphrey’s Executor* to uphold tenure protections for three-member War Claims Commission).

7       The second exception to the President’s removal power is for certain “inferior officers  
8 with limited duties and no policymaking or administrative authority.” *Seila Law*, 140 S. Ct. at  
9 2199-2200 (citing *Humphrey’s Executor*, *supra.*, and *Morrison v. Olson*, 487 U.S. 654, 108 S.  
10 Ct. 2597 (1988)). An “inferior officer” is one whose appointment Congress may vest in the  
11 President, courts, or heads of Departments. U.S. Constitution, Art. II, § 2, cl. 2. A “principal  
12 officer,” by contrast, must be appointed by the President with the advice and consent of the  
13 Senate. *Id.* In *Morrison v. Olson*, the Court upheld tenure protections for an independent counsel  
14 whom Congress had made removable from office by the Attorney General only for cause.  
15 *Morrison*, 487 U.S. 654, 663 (1988). Instead of asking whether the independent counsel could be  
16 “classified as ‘purely executive,’” the Court focused instead on whether Congress’s grant of  
17 removal protections to the independent counsel “interfere[d] with the President’s exercise of the  
18 ‘executive power’ and his constitutionally appointed duty to ‘take care that the laws be faithfully  
19 executed’ under Article II.” *Id.* at 689-90. The Court concluded that the for cause provision did  
20 not interfere with the President’s authority because “the independent counsel is an inferior  
21 officer under the Appointments Clause, with limited jurisdiction and tenure and lacking  
22 policymaking or significant administrative authority.” *Id.* at 691. More recently, the Court has  
23 stated that, in distinguishing between principal and inferior officers, the Court focuses on  
24

1 whether the officer's work is "directed and supervised" by a principal officer. *Edmond v. United*  
2 *States*, 520 U.S. 651, 661, 117 S. Ct. 1573 (1997).

3 Neither exception to the President's removal power applies to the office of the General  
4 Counsel for the plain and simple reason that Congress did not include for cause removal  
5 protection in § 3(d) of the Act. Even if Congress had conferred a for cause removal restriction  
6 upon the office of the General Counsel, such a restriction would not fall within the exceptions  
7 recognized in *Humphrey's Executor* and *Morrison*.

8 The first exception, applicable to multimember expert agencies, does not apply to the  
9 General Counsel. UNFI attempts to conflate the roles of NLRB *members* with that of the General  
10 Counsel in an apparent attempt to bootstrap the "for cause" removal limitation Board members  
11 enjoy under Section 3(a), consistent with the first exception, onto the role of the General  
12 Counsel. Citing Supreme Court authority upholding for cause removal for the CFPB as "a  
13 multimember body of experts, balanced along partisan lines, that performed legislative and  
14 judicial functions...", UNFI asserts that the Court's analysis "has equal application to the NLRB,  
15 which includes the role of the General Counsel," Br. at 31-32, n.96, with no explanation or  
16 authority as to why the Court's holding would apply to the separate office of the General  
17 Counsel. The "multimember body of experts" exception plainly does not apply because the  
18 General Counsel is an individual officer who exercises executive, law-enforcement powers,  
19 wholly separate from the NLRB members who decide cases.

20 UNFI further argues, in a single sentence in a footnote with no explanation whatsoever,  
21 that the General Counsel should also fall under the second exception as an "inferior officer." *Id.*  
22 The General Counsel is not an inferior officer because no one, aside from the President,  
23 supervises the General Counsel. *Edmond*, 520 U.S. at 661 (in distinguishing between principal  
24

1 and inferior officers, the Court considers whether the officer’s work is “directed and supervised”  
2 by a principal officer). Because the Act gives the General Counsel “final authority” over  
3 investigating and issuing unfair labor practice complaints, 29 U.S.C. § 153(d), the General  
4 Counsel is a *principal* officer, and is neither directed nor supervised by the Board or any other  
5 superior principal officer. *See Local 23*, 484 U.S. at 129.

6 The Office of Legal Counsel (OLC) has reached the same conclusion, i.e. that the  
7 President has the unfettered constitutional ability to remove the General Counsel, including in a  
8 memorandum issued a few years after the Taft-Hartley Act that stated that “[t]here would appear  
9 to be little doubt that the General Counsel of the National Labor Relations Board is an executive  
10 official subject to removal at the pleasure of the President.” J. Lee Rankin, Assistant Attorney  
11 General, OLC, *Authority of the President to Remove the General Counsel of the National Labor*  
12 *Relations Board* 2 (Feb. 23, 1954) (explaining that “the President was empowered by the  
13 Constitution to remove any executive official appointed by him by and with the advice and  
14 consent of the Senate,” and because “[t]he functions of the General Counsel are in no sense of a  
15 quasi-legislative or quasi-judicial nature,” but instead “solely executive in character,” and “the  
16 term of four years is not an unconditional term of office for that period.”) (attached hereto as  
17 Appendix D). Several decades later, now Chief Justice John Roberts, as an Associate Counsel in  
18 the Reagan-era White House Counsel’s Office, considered “whether the General Counsel may be  
19 removed by the President,” and concluded that the “clear answer” is that “the General Counsel  
20 serves at the pleasure of the President.” Memo from J. Roberts to Fred Fielding, White House  
21 Counsel re: NLRB Dispute 1, 3 (July 18, 1983) (further stating that the OLC, “in an opinion  
22 dated March 11, 1959,” “concluded that the General Counsel of the Board is a purely Executive  
23 Officer and that the President has inherent constitutional power to remove him from office at  
24

1 pleasure” and that “the Department of Justice still adhered to th[at] [ ] opinion.” (cleaned up)  
2 (attached hereto as Appendix E). Thus, Even if Section 3(d) could be interpreted to provide the  
3 General Counsel some sort of tenure protection, the cited Supreme Court precedent, as well as  
4 the OLC and Roberts’ memoranda, make clear that such tenure protection would be  
5 unconstitutional.

6 **C. The General Counsel’s office is separate and distinct from the NLRB and the for**  
7 **cause removal protection Congress conferred to NLRB members does not extend**  
8 **to the General Counsel.**

9 In the absence of statutory authority creating protection from removal like Congress  
10 conferred on NLRB members, UNFI resorts to conflating the General Counsel with the NLRB  
11 itself. Notwithstanding UNFI’s efforts to obfuscate the General Counsel’s office with the Board  
12 members, the two are entirely distinct, with Congress having decided to limit the removal of  
13 NLRB officers but not the General Counsel.

14 Prior to the Taft-Hartley Act, the Board both investigated and adjudicated unfair labor  
15 practices. The Taft-Hartley Act added Section 3(d), assigning responsibility for investigating and  
16 prosecuting unfair labor practices to the newly created position of the General Counsel who,  
17 while “within the agency,” is “independent of the Board’s authority.” *NLRB v. United Food &*  
18 *Com. Workers Union, Loc. 23*, 484 U.S. 112, 129, 108 S. Ct. 413 (1987). Congress intended the  
19 General Counsel “to have the final authority to act in the name of, but independently of any  
20 direction, control, or review by, the Board in respect of the investigation of charges and the  
21 issuance of complaints of unfair labor practices, and in respect of the prosecution of such  
22 complaints before the Board.” *Id.* at 124-25 (quoting H.R. Rep. No. 80-510, at 37 (1947)).

23 By design, the positions of the General Counsel and Board members are entirely distinct.  
24 It is the General Counsel’s job to supervise the Board’s attorneys and regional office employees,  
25 29 U.S.C. § 153(d), and to prosecute unfair labor practice complaints, 29 U.S.C. § 160(b). Board

1 members primarily adjudicate unfair labor practice cases, 29 U.S.C. § 160(c), and engage in  
2 rulemaking, 29 U.S.C. § 156, among other functions the Act reserves to them. Congress made  
3 the deliberate decision in the Taft-Hartley Act to cleave the Board's law enforcement duties from  
4 its quasi-legislative and judicial functions and to vest those prosecutorial functions in the General  
5 Counsel. *See Local 23*, 484 U.S. at 124 ("The words, structure, and history of the LMRA  
6 amendments to the NLRA clearly reveal that Congress intended to differentiate between the  
7 General Counsel's and the Board's 'final authority' along a prosecutorial versus adjudicatory  
8 line."). And, while the General Counsel acts "on behalf of the Board," 29 U.S.C. § 153(d),  
9 "[c]learly this is not the same as an act 'of the Board' itself." *Local 23*, 484 U.S. at 128. In other  
10 words, Congress intended the General Counsel to act "within the agency," but independently  
11 from and not as the equivalent of the Board members.<sup>28</sup> If Congress had wanted the General  
12 Counsel to share in Board members' for cause removal protection, it would have said so  
13 explicitly, given the pains to which it went to distinguish the two roles.

14 Legislative history demonstrating Congress's intent that the Board would act in an  
15 adjudicatory capacity relied upon by UNFI, Br. at 32-33, reveals nothing about Congress's views  
16 of the General Counsel. For instance, UNFI cites legislative history indicating that Congress  
17 intended for the NLRB to function "like a court." Br. at 33. But the corollary that UNFI draws  
18 from this evidence—that permitting removal of the General Counsel would impugn the  
19

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20 <sup>28</sup> UNFI fails to acknowledge the separate nature of the General Counsel's office in making  
21 various arguments as to why the General Counsel should enjoy the same protections from  
22 removal as NLRB members, e.g. that the General Counsel "plays a critical function in the  
23 administrative structure" of the Board, Br. at 34, that the General Counsel "has served as the  
24 Board's designated legal representative," *Id.*, and that the General Counsel "plays an essential  
role in every Board case" by enforcing NLRB decisions, Br. at 36. While the General Counsel  
may play a related and complementary role to that of the NLRB, the Supreme Court has  
recognized that the NLRA's history makes clear that "the General Counsel's acts should [not] be  
considered acts of the Board." *Local 23*, 484 U.S. at 130.

1 independence of the Board itself—makes no more sense than suggesting that the President  
2 cannot remove the Attorney General or U.S. Attorneys without undermining the independence of  
3 the courts.

4 Moreover, UNFI’s analogy to the Federal Trade Commission (FTC), emphasizing  
5 congressional intent to confer “quasi-judicial” powers on both agencies in order to ensure each  
6 agency’s constitutionality, Br. at 33, is ironic, as it showcases the differences between the FTC’s  
7 General Counsel and that of the NLRB in a way that utterly destroys UNFI’s suggestion that the  
8 role of the NLRB General Counsel is tantamount to that of an NLRB member for purposes of  
9 removal protection. UNFI’s analogy proves the opposite of what it suggests. The General  
10 Counsel of the FTC is appointed by and reports to the Chairman of the Commission, who is a  
11 member of the Commission itself. 16 C.F.R. §§ 0.8 & 0.11. The NLRB had a similar structure  
12 until 1947 when the Taft-Hartley Act made the General Counsel independent of the Board and  
13 subject to appointment by the President. While both agencies may indeed exercise quasi-judicial  
14 authority, Congress chose to make the General Counsel of the NLRB independent of the Board  
15 and thus subject to removal by the President. The policy goals Congress may have sought to  
16 advance by crafting the NLRB as an independent agency simply do not dictate the parameters  
17 Congress set for the separate office of the General Counsel.

18 Because the NLRB and the General Counsel are separate and distinct, UNFI’s suggestion  
19 that allowing the President to remove the General Counsel before his four-year term ends would  
20 “convert[]” the General Counsel position to “a purely political position” and impair “the NLRB’s  
21 functioning as an independent agency” falls apart. Br. at 32. As discussed above, while Congress  
22 clearly intended for the NLRB to function independently as an adjudicative entity,<sup>29</sup> the same  
23

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24 <sup>29</sup> It is worth noting that while the NLRB may have been designed to *stabilize* labor law to some  
UNIONS’ OPPOSITION TO UNFI’S REQUEST FOR SPECIAL PERMISSION TO APPEAL – Page 48

1 cannot be said for the General Counsel, whom Congress saw fit to make subject to  
2 appointment—and removal—by the President.

3       Whatever UNFI purports to think about the General Counsel’s status as a political  
4 appointee, it has nothing do with the President’s constitutional power to remove the General  
5 Counsel. Neither does it matter, as UNFI points out, that former General Counsel Robb’s  
6 predecessor was not removed prior to the completion of his four-year term. *See* Br. at 34 (noting  
7 “everyone respected the four-year term of former General Counsel Richard F. Griffin, Jr.”). A  
8 President’s decision not to remove an officer has no bearing on whether future Presidents have  
9 the power to remove the same official. *Cf. Free Enter. Fund*, 561 U.S. at 497 (“Perhaps an  
10 individual President might find advantages in tying his own hands. But the separation of powers  
11 does not depend on the views of individual Presidents[.] ...The President can always choose to  
12 restrain himself in his dealings with subordinates. He cannot, however, choose to bind his  
13 successors by diminishing their powers, nor can he escape responsibility for his choices by  
14 pretending that they are not his own.”).

15       **D. UNFI’s tortured reading of the statute cannot overcome Congress’s decision not**  
16       **to include for cause removal protections for the General Counsel, as it provided**  
16       **for NLRB members.**

17       UNFI engages in several creative but unavailing attempts to insinuate for cause removal  
18 protections into the text of Section 3(d) despite the plain text evincing Congress’s decision not to  
19 include any such protection as it did for Board members in Section 3(a).

20       UNFI suggests that the inclusion of a fixed term of four years in Section 3(d), without  
21 more, limits the President’s ability to remove the General Counsel prior to the end of that term.  
22 *See* Br. at 36. This is incorrect. A fixed term of office is a “limitation” on the officer’s right to  
23 extent, it cannot be said that the Board is *apolitical*. The Board has five members, and the  
24 President is empowered to fill vacancies to create a majority from the President’s party. It is thus  
not entirely politically neutral.

1 hold the office, not on the President's power to remove the officer prior to the end of that term.  
2 *Parsons v. U.S.*, 167 U.S. 324, 342, 17 S. Ct. 880 (1897). In *Parsons*, the Supreme Court upheld  
3 the President's ability to remove a federal district attorney before the end of his statutory four-  
4 year term. *Id.* at 327-28. The Court held that the proper understanding of the statutory term was  
5 not as an "entitle[ment] to hold [office] for four years as against any power of the president to  
6 remove," but rather as a limitation, meaning: "in no event can they remain in office longer than  
7 that period without being reappointed." *Id.* at 342. In other words, "[i]ts purpose clearly was not  
8 to grant an unconditional term of office for that period." *Id.* at 338. Like the district attorney in  
9 *Parsons*, the General Counsel is not entitled to hold office for four years over the President's  
10 objection.<sup>30</sup> Rather, the General Counsel is *limited* to a term of no more than four years without  
11 being reappointed by the President and reconfirmed by the Senate. The General Counsel's term  
12 limit has no impact on the President's ability to remove the General Counsel. *See Free Enter.*  
13 *Fund*, 561 U.S. at 483.

14 UNFI next argues that the absence of any specific protections against removal in Section  
15 3(d) does not necessarily mean that Congress intended "a more specific judgment by Congress  
16 *either way*." Br. at 37 (emphasis added). Apparently, UNFI believes it is just as likely that  
17 Congress intended to confer *more* protection from removal for the General Counsel because,  
18 whereas Section 3(a) specifies various grounds that may allow the President to remove a Board  
19 member, e.g. neglect of duty or malfeasance in office, no such contemplated grounds of removal  
20

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21 <sup>30</sup> UNFI's only attempt to escape *Parsons*' holding that a term limit does not create for cause  
22 removal protection is to note that *Parsons* was decided more than 50 years before the creation of  
23 the General Counsel position. The long period of time in which *Parsons* was undisturbed and  
24 applied to other offices merely reinforces the lesson that Congress's omission of for cause  
removal language was intentional. Congress is presumed to be familiar with important Supreme  
Court precedents and that it intends for its "enactments to be interpreted in conformity with  
them." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699, 99 S. Ct. 1946 (1979).

1 were listed at all in Section 3(d). This bizarre outcome is the necessary and inescapable  
2 conclusion of UNFI's strained reading of the statutory language. The absence of a removal  
3 provision either means that the President has no authority to remove the General Counsel,  
4 regardless of the General Counsel's conduct, or the Act places no limit on the President's  
5 authority to remove the General Counsel. It is entirely implausible that the General Counsel can  
6 be removed by no one, for any reason.

7 UNFI attempts to analogize the office of the General Counsel to the War Claims  
8 Commission at issue in *Wiener v. U.S.*, where the Supreme Court inferred removal protections  
9 for War Claims Commissioners based on "the intrinsic judicial character of the task with which  
10 the Commission was charged." *Wiener*, 357 U.S. at 355. However, *Wiener* is based entirely on  
11 an application of the *Humphrey's Executor* exception, which only applies to multi-member  
12 bodies of experts. At most, *Wiener* could be cited to find an inferred removal protection for  
13 members of the NLRB, as a multi-member body of experts, had Congress not made inference  
14 unnecessary and made explicit its desire to insulate members of the NLRB (but not the General  
15 Counsel) from Presidential removal.

16 There simply is no legislative or constructive basis to infer protection from removal  
17 where the General Counsel *does not* exercise quasi-judicial authority and is not a member of a  
18 multi-member body of experts. *Wiener* is plainly inapposite.

19 **E. Nothing in the Landum-Griffin's Act legislative history can overcome the plain**  
20 **language in Section 3(d), or the default rule that the President may remove**  
21 **executive officers at will.**

22 UNFI concludes its ill-conceived attack on the President's ability to remove the General  
23 Counsel by combing through legislative history in a last ditch effort to conjure for cause removal  
24 restrictions into the text of Section 3(d) where none exist. Resorting to interpreting legislative  
history is unnecessary where the text of Section 3(d) conclusively answers the question of

1 whether Congress intended to restrict the President's ability to remove the General Counsel.  
2 Even when legislative history is consulted, however, there is no basis for imposing for cause  
3 removal restrictions on Section 3(d).

4 UNFI flips on its head the default presumption that a President may remove executive  
5 officers at will, suggesting that there is no evidence in the legislative record to suggest that  
6 Congress intended to allow the General Counsel to be removed. Br. at 41. UNFI ignores the  
7 default presumption, which is that the President retains the ability to remove executive officers  
8 like the General Counsel at-will. *See e.g. Myers*, 272 U.S. at 117 ("in the absence of any express  
9 limitation respecting removals, that as [President's] selection of administrative officers is  
10 essential to the execution of the laws by him, so must be his power of removing those for whom  
11 he cannot continue to be responsible"); *Seila Law*, 140 S. Ct. at 2198 ("the general rule [is] that  
12 the President possesses 'the authority to remove those who assist him in carrying out his  
13 duties.'" (citation omitted). UNFI impliedly acknowledges that the argument for imputing for  
14 cause removal into the text depends on *inferring* that Congress intended to impose such  
15 restrictions, as was found to be the case in *Wiener v. United States*, notwithstanding Congress's  
16 failure to simply repeat the express language it used in Section 3(a). Br. at 37-38. UNFI then  
17 goes on to speculate without basis that because President Truman opposed the Taft-Hartley Act,  
18 Congress must have intended to deny President Truman (and all subsequent Presidents) the  
19 authority to remove the General Counsel. Such an illogical leap does not prove that Congress  
20 intended to create for cause removal protections for the General Counsel, yet somehow forgot to  
21 include the words it used in Section 3(a).<sup>31</sup>

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23 <sup>31</sup> UNFI also cites to a single senator's statement found in the legislative history of the Taft-  
24 Hartley Act as evidence of congressional intent to extend the Board members' tenure protections  
to the General Counsel. Br. at 41, n.141. "[F]loor statements by individual legislators rank

1 UNFI next repeats its failed argument, addressed above, *see supra* at Sec. IV.C, that the  
2 General Counsel's role must be equated with, and given the same protections from removal as,  
3 the Board members themselves. In the absence of express congressional intent, that argument  
4 failed earlier and fails again here.

5 UNFI further argues that the Taft-Hartley amendments that created the office of the  
6 General Counsel evinced an intent to ensure that the Board act in an even-handed manner. UNFI  
7 urges the Board to infer Congress's intent that the General Counsel must "adhere[] to principles  
8 of law, as decided by the Board, rather than the President's separate policies and priorities." Br.  
9 at 45. Contrary to UNFI's assertion, it is routine for the General Counsel, upon taking office, to  
10 issue memoranda directing agency staff to submit certain types of cases for review so that the  
11 General Counsel can enforce the law in a manner consistent with the viewpoints that caused the  
12 President to nominate that person. *See e.g.* Memorandum GC 18-02 (2017) (identifying  
13 mandatory submissions to Division of Advice). The suggestion that the General Counsel was  
14 intended to be so cocooned from politics and presidential policy preferences such that Congress  
15 must be found to have silently included for cause removal protections in Section 3(d) is simply  
16 inconsistent with how the General Counsel's office has operated since its inception.

17 In sum, UNFI's assault on President Biden's removal of former General Counsel Robb is  
18 unsupported and meritless.

## 19 CONCLUSION

20 For all the above-stated reasons, the Unions respectfully request that UNFI's Request for  
21  
22 among the least illuminating forms of legislative history." *NLRB v. SW General, Inc.*, 137 S.Ct.  
23 929 at 943 (2017). This is even more the case where the statement is made by a legislator  
24 speaking in opposition to the proposed legislation. *United States v. Pabon-Cruz*, 391 F.3d 86,  
101 (2d Cir. 2004) ("it is well established that speeches by opponents of legislation are entitled  
to relatively little weight in determining the meaning of the Act in question." (quoting *Holtzman*  
*v. Schlesinger*, 414 U.S. 1304, 1313 n. 13 (1973) (Marshall, J., in chambers))).

1 Special Permission to Appeal the Regional Director's Order Seeking to Remove Claims Being  
2 Adjudicated by the Board, as well as the Appeal itself, be denied.

3 RESPECTFULLY SUBMITTED this 16th day of March, 2021.

4 

5 Danielle Franco-Malone, WSBA #40979

6 Ben Berger, WSBA #52909

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## DECLARATION OF SERVICE

I, Esmeralda Valenzuela, declare under penalty of perjury under the laws of the State of Washington, that on the date set forth below I caused the foregoing TEAMSTERS LOCAL 117 AND LOCAL 313'S OPPOSITION TO UNFI'S REQUEST FOR SPECIAL PERMISSION TO APPEAL REGIONAL DIRECTOR'S ORDER SEEKING TO REMOVE CLAIMS BEING ADJUDICATED BY THE BOARD to be filed with the Office of Executive Secretary/Board via electronic filing.

On this same date, I caused a true and correct copy of the same to be served via electronic mail to:

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Ronald K. Hooks, Regional Director National Labor Relations Board Region 19 915 2nd Avenue, Room 2948 Seattle, WA 98174-1078 <a href="mailto:ronald.hooks@nrlb.gov">ronald.hooks@nrlb.gov</a>	<input type="checkbox"/> Hand Delivery <input type="checkbox"/> Certified Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Service
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DATED this 16th day of March, 2021 at Seattle, Washington.

By:   
Esmeralda Valenzuela, Paralegal

**APPENDIX A**

*AM/NS Calvert, LLC's Motion to Clarify the Status of Employer Respondent's  
Motion for Summary Judgment and for a Section 102.24(B) Notice to Show Cause  
(February, 3, 2021)*

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 15**

AM/NS Calvert, LLC	)	
	)	
and	)	
	)	Case Nos. 15-CA-244523
	)	15-CB-244598
AUSTIN SEAMANDS	)	
	)	
and	)	
	)	
UNITED STEEL, PAPER, AND FORESTRY,	)	
RUBBER, MANUFACTURING, ENERGY,	)	
ALLIED INDUSTRIAL AND SERVICE	)	
WORKERS INTERNATIONAL UNION	)	

**MOTION TO CLARIFY THE STATUS OF EMPLOYER RESPONDENT’S  
MOTION FOR SUMMARY JUDGMENT AND FOR A SECTION 102.24(b)  
NOTICE TO SHOW CAUSE**

Employer Respondent AM/NS Calvert, LLC (“AM/NS”), respectfully asks the Board to clarify the status of AM/NS’s January 21, 2021 Motion to Transfer Proceedings and for Summary Judgment (a copy of which is re-attached hereto as “**Exhibit A**”) and enter a Notice to Show Cause under Section 102.24(b) of the Board’s Rules and Regulations and Statement of Procedures, Series 8, as amended, *see* 29 C.F.R. § 102.24(b), in order that Board may have time to consider that Motion. In further support hereof, AM/NS shows as follows:

1. The Board must take immediate action to ensure that the Regional Director and the Board’s Deputy Executive Secretary comply with the express requirements of Rules and Regulations §§ 102.18 and 102.24. As it stands, the Regional Director (apparently aided by the General Counsel’s Office) and the Board’s Deputy Executive Secretary are claiming for themselves the unilateral right to assume functions reserved for the Board, and they are claiming the right to disregard the express requirements of the Board’s own Rules and Regulations.

### **Procedural Background**

2. On January 21, 2021, AM/NS filed a Motion to Transfer Proceedings and for Summary Judgment in the present consolidated proceeding. (*See* Ex. A, attached.) The basis for that Motion was that **both** Employer Respondent AM/NS (in Case 15-CA-244523) **and** the Minority Union Respondent USW (in Case 15-CB-244598) had, via their Answers, **admitted all material factual allegations** in the Regional Director's Complaints.

3. Specifically, the Regional Director had alleged violations of Sections 8(a)(1) and 8(a)(2) (by the Employer Respondent) and Sections 8(b)(1)(A) and 8(b)(2) (by the Minority Union Respondent). AM/NS maintained that, in light of the parties' admissions of the Regional Director's material allegations, there was no need for the upcoming hearing before the Administrative Law Judge, and as such, AM/NS asked the Board to take jurisdiction over the case under Rules and Regulations §§ 102.24(b) and 102.50.

4. Following receipt of AM/NS's Motion, the Regional Director purported to enter "Orders" on January 28, 2021 withdrawing both the Complaint in Case 15-CA-244523 and the Complaint in Case 15-CB-244598. (Copies of these "Orders" are attached hereto as "**Exhibit B**" and "**Exhibit C**," respectively.)

5. The next day, on January 29, 2021, the Board's Deputy Executive Secretary pronounced, by letter, that AM/NS's Motion for Summary Judgment was "moot" and would "not be considered by the Board." (A copy of this January 29, 2021 letter is attached hereto as "**Exhibit D**."')

6. Also on January 29, 2021, AM/NS moved to strike or vacate the Regional Director's "Orders" because these "Orders" did not comply with Rules and Regulations § 102.18. On February 2, 2021, the Regional Director filed an Opposition to AM/NS's Motion. (Copies of

AM/NS's Motion to Strike and the Regional Director's Opposition are attached hereto as "**Exhibit E**" and "**Exhibit F**," respectively.")

7. On February 3, 2021, the Board's Deputy Executive Secretary issued another letter, this time purporting to reject AM/NS's January 29, 2021 Motion to Strike. (A copy of this February 3, 2021 letter is attached hereto as "**Exhibit G**.")

8. In the interim, on February 1, 2021, the Regional Director separately wrote to the Charging Party Austin Seamands to explain that the Regional Director would not be issuing any new Complaint in Case 15-CA-244523. (A copy of this February 3, 2021 letter is attached hereto as "**Exhibit H**.")

9. Regarding a June 6, 2019 Settlement Agreement Term Sheet between the Employer Respondent AM/NS and the Minority Union Respondent the USW, the Regional Director's February 1, 2021 letter addressed to the Charging Party says that "the provisions of the Term Sheet expired when the Union's organizing campaign ended ...." (Ex. H, attached, p. 2.) The Regional Director had, however, previously alleged, in Complaint paragraph 6(g) in Case 15-CA-244523, that this same Term Sheet was itself a "collective-bargaining agreement."

### **Argument**

10. The Board's Deputy Executive Secretary now says: "The courts and the Board have long held that a Regional Director retains the prosecutorial discretion to withdraw or dismiss a complaint prior to a hearing.... Accordingly the Regional Director was under no obligation to file a motion with the Board in order to withdraw the complaints and notices of hearing." (Ex. G, attached, p. 1.) In making this pronouncement, the Deputy Executive Secretary **ignores the express language of Rules and Regulations §§ 102.18 and 102.24.**

11. Contrary to the Deputy Executive Secretary's and Regional Director's arguments, it is not a question, under *NLRB v. UFCW Local 23, AFL-CIO*, 484 U.S. 112 (1987), of whether

the Regional Director has or does not have “prosecutorial authority”—rather the question is how the Regional Director’s authority (whatever the scope or nature of this authority) is to be exercised.

12. Rules and Regulation § 102.18 provides the answer: “A complaint may be withdrawn before the hearing by the Regional Director **on the Director’s own motion.**” (emphasis added). Therefore, the Board has said, exercising its statutory authority to issue rules and regulations, that **the Regional Director must file a motion.**

13. Here, the Regional Director **did not file any motion** for withdrawal of the Complaints, but instead unilaterally purported to enter “Orders.” That was in express disregard of what Section 102.18 requires.

14. Further, Rules and Regulation § 102.24(a) specifies **where** the Regional Director is to file a withdrawal motion: “All motions for ... dismissal made prior to the hearing must be filed in writing **with the Board** pursuant to the provision of § 102.50.” (emphasis added).

15. Reading Section 102.18 and 102.24(a) in tandem, it is clear that withdrawal of a Complaint must be effectuated by the Regional Director’s motion—not the Regional Director’s unilateral “Order”—and further that the Regional Director must file such a withdrawal motion with the Board. The Board’s Deputy Executive Secretary has purported to exempt the Regional Director of both these express requirements.

16. Further, the Deputy Executive Secretary had no authority to unilaterally pronounce AM/NS’s Motion for Summary Judgment as “moot” on January 29, 2021. Rules and Regulations § 102.24(b) provides, in relevant part: “Upon receipt of a motion [for summary judgment or dismissal], the Board may deny the motion or issue a Notice to Show Cause why the motion may not be granted.” Here, the Board has not denied the Motion for Summary Judgment; rather, the

Deputy Executive Secretary has simply pronounced it “moot,” relying on the Regional Director’s unilateral “Orders” issued in direct contravention of Rules and Regulations § 102.18.

17. Moreover, neither the Deputy Executive Secretary nor the Regional Director have adjudicative functions to perform here. Both are defined, in Section 4(a) of the Act, as “employees” of the Board: “The Board shall appoint an **executive secretary**, and such attorneys, examiners, and **regional directors, and such other employees** as it may from time to time find necessary for the proper performance of its duties.” 29 U.S.C. § 154.

18. Accordingly, AM/NS respectfully asks the Board to clarify that the Motion for Summary Judgment is still pending and further asks that the Board go ahead and issue a Section 102.24(b) Notice to Show Cause so as to preserve the Board’s ability to consider AM/NS’s pending Motion—at least until such time as the Regional Director complies with Rules and Regulations §§ 102.18 and 102.24(a) and files a written motion to withdraw the underlying Complaints.

19. Also, the Counsel for the General Counsel has joined the Regional Director’s briefing and has expressly asked for “opportunity to respond further,” where appropriate. (*See* Ex. F, attached, p.2 n.2.) This itself poses the question of who speaks for the General Counsel’s Office, given President Biden’s recent attempt to remove the General Counsel before expiration of his four-year term specified in the Act. *See, e.g., NLRB v. SW General*, 137 S.Ct. 929 (2017). Unlike the Deputy Executive Secretary or the Regional Director (whose employment is governed by Section 4(a) of the Act), Section 3(d) of the Act gives the President of the United States the power to appoint a General Counsel for a four-year term, subject to the advice and consent of the Senate. *See* 29 U.S.C. § 153(d).

20. The present scenario is particularly acute given the Regional Director's purported February 1, 2021 findings regarding the June 6, 2019 Settlement Agreement Term Sheet. This Term Sheet contains a facially unlawful provision that defines the "Appropriate Bargaining Unit" and scope of work, as well as defining under what circumstances that scope would change. Scope of work is a mandatory subject of bargaining.<sup>1</sup> Remarkably, the Term Sheet even prescribes how additional work currently performed by employees outside the defined "Appropriate Bargaining Unit" would, in the future, be performed by unit employees.<sup>2</sup>

21. AM/NS maintains that an arbitrator forced it to enter into this Term Sheet. This is that same Term Sheet that the Regional Director previously alleged, in Complaint paragraph 6(g), was itself a "collective-bargaining agreement." The Regional Director now discounts Complaint paragraph 6(g) by saying that "the provisions of the Term Sheet expired when the Union's organizing campaign ended ...." (Ex. H, attached, p. 2.) If the Regional Director's February 1, 2021 position were correct, this would present a classic situation of "nonmootness," presenting a scenario that is "capable of repetition, yet evading review." *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 463-64 (2007); *Roe v. Wade*, 410 U.S. 113, 125 (1973).

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<sup>1</sup> The Board has made clear that the transfer of bargaining unit to work to "nonunit employees" is a "mandatory subject of bargaining where it has an impact on unit work." *Regal Cinemas, Inc.*, 334 NLRB 304, 304 (2001), *enfd* 317 F.3d 300 (2003). Like the transfer of "projectionist" work at issue in *Regal Cinemas*, the Term Sheet directly addresses the relationship between work performed by hourly bargaining-unit members and work performed by non-unit, salaried "Specialists and Planners."

<sup>2</sup> Specifically, the Term Sheet excludes these salaried, non-management "Specialists and Planners" from the defined "Appropriate Bargaining Unit" consisting of hourly employees, but it also provides: "The employees in the Specialist and Planners classification identified in Attachment 2 will be allowed to execute work they currently perform until they attrite out of their present position. Once these employees leave the Specialist and Planners classification, the work they performed will revert to the bargaining unit as appropriate." (AM/NS's MSJ Ex. 3, AM/NS Answer, Ex. H, Term Sheet, p. 2.)

22. Here, considering the stakes raised in the underlying Complaints and because the Regional Director has already attempted, improperly, to withdraw its Complaints in a manner in contravention of Rules and Regulations § 102.18 and 102.24(a), AM/NS's request for a Section 102.24(b) Notice to Show Cause is time-sensitive and should be granted.

**Conclusion**

WHEREFORE, Employer Respondent AM/NS asks the Board clarify that AM/NS's Motion to Transfer Proceedings and for Summary Judgment remains pending and to enter a Notice to Show Cause under Section 102.24(b) on this Motion for Summary Judgment.

*s/ John J. Coleman*

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ATTORNEYS FOR RESPONDENT

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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 15**

<b>AM/NS Calvert, LLC</b>	)	
	)	
<b>and</b>	)	
	)	<b>Case Nos. 15-CA-244523</b>
	)	<b>15-CB-244598</b>
<b>AUSTIN SEAMANDS</b>	)	
	)	
<b>and</b>	)	
	)	
<b>UNITED STEEL, PAPER, AND FORESTRY,</b>	)	
<b>RUBBER, MANUFACTURING, ENERGY,</b>	)	
<b>ALLIED INDUSTRIAL AND SERVICE</b>	)	
<b>WORKERS INTERNATIONAL UNION</b>	)	

**AFFIDAVIT OF SERVICE**

I, the undersigned counsel for AM/NS Calvert, LLC, being duly sworn, hereby certify that a copy of the foregoing was electronically filed with the Executive Secretary of the Board in Washington, DC and sent to the following via e-mail, on this the 3rd day of February, 2021:

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\_\_\_\_\_  
OF COUNSEL

**APPENDIX B**

*AM/NS Calvert, LLC's Motion to Transfer Proceedings to the Board and for Summary Judgment  
and Issuance of a Decision and Order  
(January 21, 2021)*

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 15**

AM/NS Calvert, LLC	)	
	)	
and	)	
	)	Case Nos. 15-CA-244523
	)	15-CB-244598
AUSTIN SEAMANDS	)	
	)	
and	)	
	)	
UNITED STEEL, PAPER, AND FORESTRY,	)	
RUBBER, MANUFACTURING, ENERGY,	)	
ALLIED INDUSTRIAL AND SERVICE	)	
WORKERS INTERNATIONAL UNION	)	

**EMPLOYER RESPONDENT’S MOTION TO TRANSFER PROCEEDINGS TO THE  
BOARD AND FOR SUMMARY JUDGMENT AND ISSUANCE OF A DECISION AND  
ORDER**

Employer Respondent AM/NS Calvert, LLC (“Employer Respondent” or “AM/NS”), pursuant to Sections 102.24 and 102.50 of the National Labor Relations Board’s Rules and Regulations and Statement of Procedures, Series 8, as amended, *see* 29 C.F.R. §§ 102.24 & 102.50, moves the National Labor Relations Board (the “Board”) to (1) transfer this case and continue proceedings before the Board; (2) deem the material factual allegations set forth in the Complaint and Notice of Hearing issued in Case 15-CA-244523 and in the Complaint and Notice of Hearing in Case 15-CB-244598 to be true without the need to take evidence supporting these allegations; and (3) grant summary judgment and issue a Decision and Order on the basis of the following:

**Procedural Background**

Last month, Regional Director entered an Order consolidating proceedings in two cases:

- The first case (No. 15-CA-244523) alleges that the Employer Respondent AM/NS violated National Labor Relations Act Sections 8(a)(1) and 8(a)(2) by interfering

with, restraining, and coercing its employees in exercise of their Section 7 rights and by rendering unlawful assistance to the United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (the “Minority Union Respondent” or the “Minority Union USW”).

- The second case (No. 15-CB-244598) alleges that the Minority Union Respondent USW violated Section 8(b)(1)(A) by restraining and coercing employees in the exercise of their Section 7 rights and violated Section 8(b)(2) by attempting to cause and causing the Employer Respondent AM/NS to discriminate against its employees in violation of Section 8(a)(3).

The Employer Respondent and Minority Union Respondent **admitted all of the Complaints’ material factual allegations** before the Regional Director ordered consolidation.

Given the admissions in the responsive pleadings, there is no need for hearing before the administrative law judge. Instead, this matter should be transferred to the Board so that it may make an appropriate determination regarding whether or not the already-admitted facts suffice to show violations of Section 8(a)(1), 8(a)(2), 8(b)(1)(A), and 8(b)(2), as alleged in the Complaints. Regrettably, as set forth below, AM/NS believes that, under the Board precedents, these admitted facts establish its own violations of Sections 8(a)(1) and 8(a)(2), and these admitted facts also establish the Minority Union USW’s corresponding violations of Sections 8(b)(1)(A) and 8(b)(2).

#### **Established Facts**<sup>1</sup>

1. The Region’s Complaint against the Employer Respondent AM/NS is based on

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<sup>1</sup> These facts are those confined to facts admitted on the record by the parties. Except as noted, both AM/NS and the Minority Union USW have made these admissions. And where noted, if only one party has made the admission, then the admission is by party whose actions are in issue.

unfair labor practice charges that AM/NS employee Austin Seamands filed on July 5, 2019. (**Exhibit 1**, attached, Original Charge in Case No. 15-CA-244523; **Exhibit 2**, attached, Complaint in Case No. 15-CA-244523, ¶ 1(a); **Exhibit 3**, attached, AM/NS Answer, ¶ 1(a).)<sup>2</sup>

2. The Region’s Complaint against Union Respondent Minority Union USW is based on unfair labor practice charges that AM/NS employee Austin Seamands filed on July 8, 2019. (**Exhibit 5**, attached, Original Charge in Case No. 15-CB-244598; **Exhibit 6**, attached, Complaint in Case No. 15-CB-244598, ¶ 1(a); **Exhibit 7**, attached, USW Answer, ¶ 1(a).)<sup>3</sup>

3. Since at least 2015, the Minority Union USW and another employer, ArcelorMittal USA, maintained a “Basic Labor Agreement,” which contains “Neutrality Agreement” provisions, (Ex. 3, AM/NS Answer, ¶ 6(a); Ex. 7, USW Answer, ¶ 2(f).)

4. In January 2019, the Employer Respondent AM/NS, an “employer” under National Labor Relations Act Section 2(2) and engaged in commerce under Section 2(6), agreed to—and began applying—the following terms from this “Neutrality Agreement” with the Minority Union Respondent USW, a “labor organization” under Section 2(5):

a. The Minority Union USW was given private employee information:

“Within five (5) days following Written Notification [of the Organizing Campaign], the Company shall provide the Union with a complete list of all of its employees in the proposed bargaining unit who are eligible for Union representation. Such list shall include each employee’s full name, home address, job title and work location.”

(Ex. 3, AM/NS Answer, ¶ 6(b); Ex. 7, USW Answer, ¶ 5(a));

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<sup>2</sup> Mr. Seamands amended this charge on July 30, 2019. (**Exhibit 4**, attached, Amended Charge in Case No. 15-CA-244523; Ex. 2, Compl., ¶ 1(b); Ex. 3, AM/NS Answer, ¶ 1(b).)

<sup>3</sup> Mr. Seamands amended this charge on July 30, 2019. (Ex. 6, Compl., ¶ 1(b); Ex. 7, USW Answer, ¶ 1(b).)

b. The Minority Union USW was given exclusive access:

“During the Organizing Campaign, the Company ... shall grant continuous access to well-traveled areas of its facilities to the Union for purposes of distributing literature and meeting with unrepresented Company employees.”

(Ex. 3, AM/NS Answer, ¶ 6(b); Ex. 7, USW Answer, ¶ 5(a));

c. The Minority Union USW was given exclusive bargaining status even before it had to show majority status:

“As soon as practicable following the Written Notification [of the Organizing Campaign], the parties will meet to attempt to reach an agreement on the unit appropriate for bargaining. In the event that the parties are unable to reach agreement on an appropriate unit, either party may refer the matter to the Dispute Resolution Procedure contained in Paragraph 7 below.”

(Ex. 3, AM/NS Answer, ¶ 6(c); Ex. 7, USW Answer, ¶ 5(a));

d. If the Minority Union USW were to show a card-check majority, it would not have to start bargaining for a first collective bargaining agreement “from scratch”; instead:

“In these negotiations, the parties shall bear in mind the wages, benefits and working conditions in the most comparable operations of the Company (if any comparable operations exist), and those of unionized competitors to the facility in which the newly recognized unit is located.”

(Ex. 3, AM/NS Answer, ¶ 6(c); Ex. 7, USW Answer, ¶ 5(a));

e. The Minority Union USW was given interest arbitration once it obtained majority status if the parties could not agree on a first collective bargaining agreement:

“If ... the parties remain unable to reach a collective bargaining agreement, the matter may be submitted to final offer interest arbitration in accordance with the procedures to be developed by the parties.”

“If interest arbitration is invoked, it shall be a final offer package interest arbitration proceeding. . . . The interest arbitrator shall select the final offer package found to be the more reasonable when considering (1) the negotiating guidelines described in Paragraph

6(a) above [requiring the parties to ‘bear in mind the wages, benefits and working conditions in the most comparable operations of the Company ... and those of unionized competitors’], (2) any matters agreed to by the parties and therefore not submitted to interest arbitration and (2) the fact that the collective bargaining agreement will be a first contract between the parties.”

(Ex. 3, AM/NS Answer, ¶ 6(c); Ex. 7, USW Answer, ¶ 5(a)); and

f. The Minority Union USW pledged not strike once it obtained majority status and was given corresponding advanced commitment that the employer would not engage in a “lockout” of the bargaining unit:

“[T]he Union agrees that there shall be no strikes, slowdowns, sympathy strikes, work stoppages or concerted refusals to work in support of any of its bargaining demands. The Company, for its part, likewise agrees not to resort to the lockout of Employees to support its bargaining position.”

(Ex. 3, AM/NS Answer, ¶ 6(c); Ex. 7, USW Answer, ¶ 5(a)).

5. AM/NS and the Minority Union USW agreed to the terms of the “Neutrality Agreement” referenced next above at a time before the Minority Union USW had gained any majority employee support. (Ex. 3, AM/NS Answer, ¶ 6(e); Ex. 7, USW Answer, ¶ 6(a).)<sup>4</sup>

In admitting the material factual allegations regarding the “Neutrality Agreement” terms, the Minority Union USW refers in its Answer to an Arbitration Award dated April 4, 2019 and a Supplemental Award dated April 19, 2019 (*see* Ex. 7, USW Answer, ¶ 6(a)); in these referenced Awards by Arbitrator Dilts:

a. The Arbitrator gave the Minority Union USW exclusive access:

“The Company is ordered to provide [the Minority Union USW] access to all employees in all non-working areas of the mill ...”

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<sup>4</sup> The Minority Union USW denies part of Complaint paragraph 6(a) in its Answer. However, the Minority Union USW nowhere claims to have represented a majority of AM/NS employees as of January 2019. *See* note 6, *infra*.

(Ex. 3, AM/NS Answer, Ex. B, Apr. 4, 2019 Award p. 34);

- b. The Arbitrator barred union-free advocates and other unions from Employer

Respondent AM/NS's premises:

"Access to employees by groups other than the Union shall not be permitted by the Employer on company time or property if the purpose of that group is to present a case contrary to that presented by the Union."

(*Id.*);

- c. The Arbitrator gave the Minority Union USW exclusive bargaining rights:

"The parties are to meet and confer concerning the appropriate bargaining unit immediately upon receipt of this award."

(*Id.*);

- d. The Arbitrator deemed that those other than the Minority Union USW could

not speak:

"To provide access to employees or groups who oppose unionization is a clear breach of neutrality .... For the employer to assert that the anti-union groups and employees have a federally protected right to present a contrary case to the unionization of its workforce is not an issue in this matter."

(Ex. 3, AM/NS Answer, Ex. B, Apr. 19, 2019 Opinion, p. 6.)

6. AM/NS complied with the Arbitrator's order in all material respects. (Ex. 3, AM/NS Answer, Affirmative Defense No. 2.m.)

7. Beginning at the end of April 2019, AM/NS refused to grant anti-USW employees and their representatives the same level of access to AM/NS's facility as it was giving the Minority Union USW. (Ex. 3, AM/NS Answer, ¶ 6(f).)<sup>5</sup>

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<sup>5</sup> The Minority Union USW denies Complaint paragraph 6(b) in its Answer. However, that allegation concerns AM/NS's conduct, not the Minority Union USW's. Therefore, AM/NS's admission should be determinative as to this issue. Moreover, the requirement that AM/NS **not** "provide access to employees or groups who oppose unionization" is made express in the

8. On or about June 6, 2019, AM/NS and Minority Union USW entered into a Settlement Agreement Term Sheet (the “Term Sheet”). (Ex. 3, AM/NS Answer, ¶ 6(g); Ex. 7, USW Answer, ¶ 7(a).)

9. The Term Sheet contained two unit-definition provisions:

a. One defined the appropriate bargaining unit to be represented by the Minority Union USW:

“All hourly full-time and regular part-time production and maintenance employees employed by the Company at its Calvert Alabama facility; excluding all salary, office clerical, and technical employees, temporary employees, guards, professional and confidential employees, and supervisors ....”

(Ex. 3, AM/NS Answer, Ex. H, Term Sheet, p. 1); and

b. Another expressly stated that the work of salaried “Specialists and Planners” would become “bargaining unit” work for the Minority Union USW after the current incumbents in those salaries positions left:

“The employees in the Specialist and Planners classification identified in Attachment 2 will be allowed to execute work they currently perform until they attrite out of their present position. Once these employees leave the Specialist and Planners classification, the work they performed will revert to the bargaining unit as appropriate.”

(*Id.*, Term Sheet, p. 2.)

10. At the time AM/NS and the Minority Union USW entered into this Term Sheet, the Minority Union USW did not represent a majority of employees in the referenced “Appropriate

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Arbitrator’s April 19, 2019 Opinion. (See Ex. 3, AM/NS Answer, Ex. B, Apr. 19, 2019 Opinion, p. 6.) The Minority Union USW, in paragraph 6(a) of its Answer, admits that it filed a grievance that “resulted in ... a supplemental award dated April 19, 2019,” so the contents of the Arbitrator’s April 19, 2019 Opinion are properly before the Board, notwithstanding the Minority Union USW’s denial contained in paragraph 6(b) of its Answer.

Bargaining Unit.” (*Id.*, AM/NS Answer, ¶ 6(h).)<sup>6</sup>

11. The Minority Union USW conducted its “2019 Remedial Organizing Campaign” under this Term Sheet and thereafter, on July 28, 2019, made a demand for recognition on AM/NS. Specifically, the Minority Union USW claimed to have obtained authorization cards signed by majority of employees in the “Appropriate Bargaining Unit,” as this term was defined in the Term Sheet. (Ex. 7, USW Answer, ¶ 6(a) (referencing Indiana Complaint); *see* Ex. 8, Indiana Compl., ¶ 33.)

12. When AM/NS did not immediately recognize the Minority Union USW as the exclusive bargaining representative for the employees in the “Appropriate Bargaining Unit” and when AM/NS would not arbitrate disputes regarding the Minority Union USW’s claimed card-check majority, the Minority Union USW filed suit against both AM/NS and ArcelorMittal USA in the United States District Court for the Northern District of Indiana, Case No. 2:10-cv-00360, seeking enforcement of the ArcelorMittal USA “Basic Labor Agreement”—which contained the “Neutrality Agreement”—and the Term Sheet. (Ex. 7, USW Answer, ¶ 6(a) (referencing Indiana Complaint); *see* Ex. 8, Indiana Compl.)

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<sup>6</sup> The Minority Union USW denies part of Complaint paragraph 7(c) in its Answer. However, because the Minority Union USW nowhere claims to have represented a majority of employees as of June 6, 2019, AM/NS’s admission of Case No 15-CA-244523 Complaint ¶ 6(h) should be determinative as to this issue. Moreover, the Term Sheet purported to govern the “2019 Remedial Organizing Campaign.” If the Minority Union USW had already obtained a card-check majority as of June 6, 2019, the Minority Union USW would not have been wanting a “Remedial Organizing Campaign.” Also, in the Complaint the Minority Union USW filed in United States District Court on September 24, 2019, the Minority Union USW represented that it had made its demand for card-check recognition at AM/NS on July 28, 2019. (**Exhibit 8**, attached, Indiana Compl., ¶ 33.) The fact that the Minority Union USW made a demand for card-check recognition at the end of July strongly implies that the Minority Union USW could not claim to have enjoyed a card-check majority as of early June that same year. The Minority Union USW references this Indiana Complaint in paragraph 6(a) of its Answer, and the Minority Union USW’s admissions in this Complaint are discussed in more detail below.

13. The Minority Union USW attached to its Indiana Complaint a six-page list of all AM/NS employees allegedly in the proposed “Appropriate Bargaining Unit.” This list included the employees’ first and last names, their AM/NS position titles, their AM/NS business units, their AM/NS organizational units, and home addresses. (Ex. 8, Indiana Compl. at PageID ##157-62.)

14. In October 2020, the Board conducted an RM election, and based on the results of this election, the Minority Union USW has determined that it “does not represent the Employer’s employees.” (Ex. 7, USW Answer, Affirmative Defense No. 4.)

15. Also in October 2020, the Minority Union USW stipulated to the dismissal of the lawsuit previously initiated by its Indiana Complaint. (Ex. 7, USW Answer, ¶ 6(a).)<sup>7</sup>

### **Argument**

The Board’s summary judgment standards govern this case’s disposition. Provisions negotiated with the Minority Union Respondent are unlawful *per se*. The “Neutrality Agreement” provisions are also invalid as applied.

#### **I. The Board’s Summary Judgment Standards Govern This Case’s Disposition.**

The Board’s summary judgment standards drive this case’s disposition. Those standards are clear. Those standards applied to this record establish the unfair labor practices alleged in the Complaints without need for a hearing. Those standards call for summary disposition here.

The Board’s summary judgment standards are clear: “[I]n order for a matter to be appropriate for summary judgment, it must affirmatively appear in the record (1) that there is no genuine issue as to any material fact and (2) that the moving party is entitled to judgment as a matter of law.” *Stephens College*, 260 NRLB 1049, 1050 (1982). The Board does not require that

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<sup>7</sup> After the Minority Union USW filed its Indiana Complaint but before this dismissal, the court transferred to the action to the United States District Court for the Southern District of Alabama, where it was assigned Case No. 1:20-cv-00387.

motions for summary judgment be accompanied by supporting affidavits when, as here, undisputed admitted facts establish the violation. *See A.H. Hansen Sales, Ltd.*, 302 NLRB 846, 846 n.1 (1991)(granting summary judgment on Section 8(a)(5) charges based on letters reciting union bargaining demand and the employer’s rebuff without authenticating affidavits when letters’ authenticity was undisputed).

The Board’s standards applied to this record establish the unfair labor practices alleged in the Complaints without the need for hearing. Here, the parties admit (1) the “Neutrality Agreement” terms admitted by the Respondents and contained with the “Basic Labor Agreement” attached “Exhibit A” to AM/NS’s Answer and (2) the Term Sheet admitted by the Respondents and attached as “Exhibit H” to AM/NS’s Answer.<sup>8</sup> Since the terms of both of these documents are admitted by all parties, there is no genuine issue of material fact; the sole question is whether judgment should be entered as a matter of law.

The Board’s standards call for summary disposition here. Regrettably, the Board may enter judgment against both AM/NS and the Minority Union USW as a matter of law.

## **II. Provisions Negotiated with the Minority Union Respondent Are Unlawful Per Se.**

An employer’s agreement and arrangements with a minority union on mandatory subjects of bargaining are unlawful and unenforceable. The Term Sheet terms here establish violations *per se*. The “Neutrality Agreement” terms also establish violations *per se*. Summary judgment is appropriate.

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<sup>8</sup> The Minority Union USW protests that the Regional Director did not attach a copy of this Term Sheet to the Complaint. (Ex. 7, USW Answer, ¶ 7(a).) However, the Minority Union USW does not deny that it entered into this Term Sheet, and it even attached a copy of this Term Sheet to its Indiana Complaint. (*See* Ex. 8, Indiana Compl. at PageID ##155-65.)

**A. An Employer's Agreement with a Minority Union on Mandatory Bargaining Subjects Is Unlawful and Unenforceable.**

An employer's agreement with a minority union can be both unlawful and unenforceable under Sections 8(a)(1) and 8(a)(2). Such an agreement is unlawful and unenforceable under Section 8(a)(1) because the agreement undermines the very essence of employee Section 7 rights to make their own decisions respecting organizing and bargaining through representatives of their own choosing—the agreement gives a minority union whom the employees have never chosen a false, and coercive, cloak of representational authority. Such an agreement is also unlawful and unenforceable under Section 8(a)(2) because it offers assistance to a minority union well beyond ministerial aid.

Respecting Section 8(a)(1), the Supreme Court, agreeing with an appellate court, found it difficult to “conceive of a clearer restraint on the employees’ right of self-organization than for their employer to enter into a collective-bargaining agreement with a minority of the employees.” *Int’l Ladies Garment Workers (Bernhard-Altmann) v. NLRB*, 366 U.S. 731, 736 (1961). The Court has made clear that a Section 2(5) “labor organization” is more than a group that signs collective bargaining agreements; it “exist[s] for the purpose, in part at least, ‘of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.’” *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 213 (1959). The Court declared that an employer must never give “a deceptive cloak of authority with which to persuasively elicit additional employee support” to any “labor organization” that does not enjoy support from the majority of employees. *Bernhard-Altmann*, 366 U.S. at 736. The agreements and arrangements here are unlawful because they do precisely that—they eviscerate Section 7 rights protected by Section 8(a)(1).

Respecting Section 8(a)(2), when evaluating employer assistance provided to employees during decertification campaigns, the law is well-established: “the test is whether the [employer’s] conduct constitutes more than ministerial aid.” *Times-Herald, Inc.*, 253 NLRB 524, 524 (1980). The Board’s General Counsel has recently explained that this same test should apply to employer assistance provided to labor organizations during initial organizing campaigns. *See* Memorandum GC 20-13 (Sept. 4, 2020). As the General Counsel explains: “The prohibited employer conduct at issue in the pre-recognition and decertification contexts—unlawful assistance rather than neutrality—has, in both cases, the same impact on Section 7 rights of employee free choice. There is no reason to treat the same or similar conduct, having the same or similar effect, different in the pre-recognition and the de-certification contexts.” *Id.* at p. 5

Applying these standards here reveals violations *per se*. In entering the Term Sheet and in adhering to the Basic Labor Agreement’s “Neutrality Agreement” provisions, AM/NS entered into an arrangement conferring “a deceptive cloak of authority” on the Minority Union USW. The Term Sheet terms did this. The “Neutrality Agreement” provisions did this. As the contents of these agreements and arrangements are not disputed and are facially unlawful, the Board should grant summary judgment.

**B. The Term Sheet Terms Establish Violations Per Se.**

The contents of the Term Sheet establish the alleged violations *per se*. AM/NS did not provide mere “ministerial aid” to the Minority Union USW when it began its “Remedial Organizing Campaign”; rather, the Term Sheet covers mandatory subjects of a collective bargaining agreement and even defines the “Appropriate Bargaining Unit.”

The Term Sheet contains a facially unlawful provision that defines the “Appropriate Bargaining Unit” and scope of work, as well as defining under what circumstances that scope

would change. Scope of work is a mandatory subject of bargaining between the employer and a labor organization that has demonstrated it represents a majority of employees.<sup>9</sup> But, here, when it signed the Term Sheet, the Minority Union USW had not established that it spoke for a majority of AM/NS employees. Remarkably, the Term Sheet even prescribes how additional work currently performed by employees outside the defined “Appropriate Bargaining Unit” would, in the future, be performed by unit employees.<sup>10</sup>

By agreeing with the Minority Union USW over such terms, AM/NS presented its employees with “a fait accompli depriving the majority of the employees of their guaranteed right to choose their own representative.” *Bernhard-Altmann*, 366 U.S. at 736. Indeed, by excluding “Specialists and Planners” from the bargaining unit but then specifying that their work would “revert” to the bargaining unit once the existing “Specialists and Planners” attrited out of their current positions, the effect of the Term Sheet was to “protect” bargaining-unit work and eliminate the “Specialist and Planner” classifications going forward—as well as eliminating the opportunity for hourly employees to be promoted into salaried “Specialist and Planner” positions in the future.

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<sup>9</sup> The Board has made clear that the transfer of bargaining unit to work to “nonunit employees” is a “mandatory subject of bargaining where it has an impact on unit work.” *Regal Cinemas, Inc.*, 334 NLRB 304, 304 (2001), *enf’d* 317 F.3d 300 (2003). Like the transfer of “projectionist” work at issue in *Regal Cinemas*, the Term Sheet directly addresses the relationship between work performed by hourly bargaining-unit members and work performed by non-unit, salaried “Specialists and Planners.”

<sup>10</sup> Specifically, the Term Sheet excludes these salaried, non-management “Specialists and Planners” from the defined “Appropriate Bargaining Unit” consisting of hourly employees, but it also provides: “The employees in the Specialist and Planners classification identified in Attachment 2 will be allowed to execute work they currently perform until they attrite out of their present position. Once these employees leave the Specialist and Planners classification, the work they performed will revert to the bargaining unit as appropriate.” (Ex. 3, AM/NS Answer, Ex. H, Term Sheet, p. 2.)

Because, at the time of the Term Sheet was entered, the Minority Union USW did not represent a majority of the hourly “Appropriate Bargaining Unit” employees it was seeking to organize—to say nothing also about representing a majority of the “Specialists and Planners” that the Minority Union USW was seeking to exclude from this same “Appropriate Bargaining Unit”—AM/NS had no business entering into the Term Sheet with the Minority Union USW.<sup>11</sup>

Under the undisputed facts, judgment finding violations must be entered as a matter of law. Regrettably, AM/NS is guilty of violating Section 8(a)(1) respecting interference with the most basic employee Section 7 rights, and is guilty of violating Section 8(a)(2) for providing the Minority Union USW an invalid cloak that went well beyond “ministerial aid.” The Board must declare Term Sheet terms invalid as a matter of law. As the foregoing rests on undisputed facts, there is no need to expend resources on a hearing before the administrative law judge to decide these issues; the Board should grant summary judgment.

**C. The Basic Labor Agreement’s “Neutrality Agreement” Terms Establish Violations Per Se.**

Applying the “more than ministerial aid” standard to the terms of the so-called “Neutrality Agreement” alleged in the Complaint and admitted to by both the Employer Respondent and the Union Respondent, the unfair labor practices are clear. Provisions of this “Neutrality Agreement” are unlawful on their face.

The express “bargaining unit” information disclosure was unlawful *per se*. Language giving Minority Union Respondent preferential and premises access language was unlawful *per*

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<sup>11</sup> By way of background, the Term Sheet’s definition of the “Appropriate Bargaining Unit” appears to have been contemplated paragraph 4 of Arbitrator Dilts’s April 4, 2019 Award. (Ex. 3, AM/NS Answer, Ex. B, Apr. 4, 2019 Award p. 34; *id.*, AM/NS Answer, Ex. D, Apr. 19, 2019 Opinion, pp. 6-7.)

*se.* The unit-definition provision was unlawful *per se.* The wage provisions were unlawful *per se.* Remaining rights waiver provisions were unlawful *per se.*

### **1. The Express Information Disclosure Was Unlawful Per Se**

The so-called “Neutrality Agreement” was clear on what AM/NS had to provide the Minority Union USW: a list of all employees in the “proposed bargaining unit,” including “each employee’s full name, home address, job title and work location.” (Ex. 3, AM/NS Answer, ¶ 6(b); Ex. 7, USW Answer, ¶ 5(a).) AM/NS provided such a list, which the Minority Union USW then attached as an exhibit to its Indiana Complaint. (Ex. 8, Indiana Compl. at PageID ##157-62.)

On its face, that provision was a violation. The Board’s General Counsel has warned that providing employee names, “including personal identifying information” such as employee home addresses, “rises to the level of more than ministerial aid.” Memorandum GC 20-13 (Sept. 4, 2020), at p. 7; *see also Narricot Indus., Inc.*, 353 NLRB 775, 775 (2009), *enf’d* 587 F.3d 654 (4th Cir. 2009), *abrogated by New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).<sup>12</sup> Providing a minority union with a list of employee names provides the union with “a deceptive cloak of authority with which to persuasively elicit additional employee support.” *Bernhard-Altmann*, 366 U.S. at 736. And here, providing home addresses—which, in turn, enabled home visits by the Minority Union USW’s organizers—added to this “cloak of authority.”

### **2. Preferential Exclusive Access Was Unlawful Per Se.**

The so-called “Neutrality Agreement” required AM/NS to provide the Minority Union USW “continuous access to well-traveled areas of [AM/NS’s] facilities to the Union for purposes

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<sup>12</sup> In *Narricot*, the two-member Board explained that the employer had provided more than “ministerial aid” to an employee decertification petition when, “after giving [unit employee] Baumann a list of unit employees, [human resource manager] Potter told her that about 200 signatures were needed on the petition.” 353 NLRB at 775. Member Schaumber, however, relied on the “cumulative evidence” and not providing of the list alone. *See id.* at 776 n.7.

of distributing literature and meeting with unrepresented [AM/NS] employees.” (Ex. 3, AM/NS Answer, Ex. B, BLA p. 13.) That provision is unlawful *per se*.

In cases where a “labor organization” has already achieved majority status, the Board has held that the right of union representatives to access the plant is a mandatory subject of bargaining. *See Ernst Home Ctrs., Inc.*, 308 NLRB 848, 849 (1992). And, in the context of employee actions taken against (and not for) a union, the Board has also held that giving an anti-union employee unprecedented “freedom of the plant” to engage in anti-union activities constitutes an unfair labor practice. *See Scherer & Sons Co.*, 147 NLRB 1442, 1449 (1964). If this constitutes “more than ministerial aid,” then allowing pro-USW employees and their non-employee organizers preferential access to AM/NS’s facilities would likewise constitute “more than ministerial aid.”

### **3. The Unit-Definition Provision Was Unlawful Per Se.**

AM/NS’s assent to a collective bargaining agreement’s unit-definition provision at a time when the Minority Union USW undisputedly lacked majority status or any other basis for lawful authority to bargain on behalf of AM/NS employees is itself a *per se* violation of Section 8(a)(2). The so-called “Neutrality Agreement” required AM/NS to meet with the Minority Union USW “to attempt to reach agreement on the unit appropriate for bargaining.” Further, the parties’ advance agreement to arbitrate disputes before the Minority Union USW had shown a card-check majority in any unit also constituted a violation. (Ex. 3, AM/NS Answer, ¶ 6(c); Ex. 7, USW Answer, ¶ 5(a).)

The Board’s General Counsel has warned that “premature agreement on unit scope between the parties ousts the Board of its authority to determine the unit while at the same time giving the union ‘a deceptive cloak of authority with which to persuasively elicit additional employee support,’ thereby interfering with employee free choice.” Memorandum GC 20-13

(Sept. 4, 2020), at p. 11 (quoting *Bernhard-Altmann*, 366 U.S. at 736). The parties' agreement and behavior serves as a poster child illustration of such abuses.

#### **4. The Wage Provision Was Unlawful Per Se.**

Here, the "Neutrality Agreement" went beyond the terms of the Minority Union USW's initial organizing campaign and instead also included provisions governing how negotiations over a collective bargaining agreement would proceed in the event that the Minority Union USW were eventually to obtain majority support from a "bargaining unit." Among these provisions, the "Neutrality Agreement" purported to require that, during negotiations over a first collective bargaining agreement, AM/NS and the Minority Union USW would "bear in mind the wages, benefits and working conditions" at "comparable operations" and "those of unionized competitors to the facility." (Ex. 3, AM/NS Answer, ¶ 6(c); Ex. 7, USW Answer, ¶ 5(a).)

Coercion replaced choice. The Board's General Counsel explains that provisions like these are "unlawfully coercive, since it fixes a range of acceptable proposals even when it does not establish precise wage rates." Memorandum GC 20-13 (Sept. 4, 2020), at p. 11. Such an agreement also gives the Minority Union USW "a deceptive cloak of authority." See *Bernhard-Altmann*, 366 U.S. at 736. Notably, if AM/NS employees were to choose some other "labor organization" to represent them (and not the Minority Union USW), the employees would not be guaranteed that AM/NS would consider "comparable wages" at the bargaining table with some other labor organization.

#### **5. Remaining Rights Waiver Provisions Were Unlawful Per Se.**

Remaining provisions waiving employee rights were unlawful *per se*. The Minority Union USW could not legally agree to bind employees through bargaining and was not free to delegate that authority to an interest arbitrator. The Minority Union USW was also not free to waive

employees' Section 7 rights to strike, and AM/NS aided the Minority Union USW by agreeing to a corresponding no-lockout commitment unique to the Minority Union USW.

**a. The Minority Union Cannot Delegate to an Interest Arbitrator the Authority to Bind Employees.**

What concessions the parties could not dream up in express provisions they took away from AM/NS's employees via mandatory interest arbitration. If the Minority Union USW were eventually to obtain majority support from a "bargaining unit" at AM/NS, the parties agreed that, if the AM/NS and the Minority Union USW were subsequently unable to reach agreement on a first collective bargaining agreement, then AM/NS and the Minority Union USW would submit the matter to an arbitrator for "final offer interest arbitration." (Ex. 3, AM/NS Answer, ¶ 6(c); Ex. 7, USW Answer, ¶ 5(a).)

AM/NS and the Minority Union USW agreed, in advance, to "place[] the decision as to what terms and conditions are ultimately be in the parties' collective-bargaining agreement into the hands of a third-party arbitrator." Memorandum GC 20-13 (Sept. 4, 2020), at p. 10. Such an agreement also gives the Minority Union USW "a deceptive cloak of authority." See *Bernhard-Altmann*, 366 U.S. at 736. Notably, if AM/NS employees were to choose the Minority Union USW to represent them, they were guaranteed a first collective bargaining agreement (even it had to be imposed by an arbitrator). In contrast, were AM/NS employees to choose some other "labor organization" (and not the Minority Union USW) to represent them, they would not be guaranteed a first collective bargaining agreement.

**b. A Minority Union Cannot Waive Employee Section 7 Rights to Strike.**

The parties even removed employees' right to strike. If the Minority Union USW were eventually to obtain majority support from a "bargaining unit" at AM/NS, the Minority Union

USW agreed that it would not strike in support of any of its bargaining demands. (Ex. 3, AM/NS Answer, ¶ 6(c); Ex. 7, USW Answer, ¶ 5(a).) Normally, affected employees get a say.

Such no-strike clauses are a mandatory subject of bargaining. *See Carpenters Dist. Council of Detroit, Wayne & Oakland Counties & Vicinity, United Bhd. of Carpenters and Joiners of America, AFL-CIO (Excello Dry Wall)*, 145 NLRB 663, 666 (1963). Reaching agreement with a “labor organization” on a mandatory subject of bargaining before the labor organization has achieved majority status confers on that labor organization “a deceptive cloak of authority.” *See Bernhard-Altmann*, 366 U.S. at 736. Indeed, if AM/NS employees were to choose some other “labor organization” (and not the Minority Union USW) to represent them, the employees would not be guaranteed, in similar fashion, that they would be free from work interruptions caused by strikes (or lockouts) as part of the bargaining process.

**c. AM/NS Also Aided the Minority Union USW by Agreeing Not to Lockout Employees If They Chose the Minority Union USW as Their Exclusive Bargaining Representative.**

No-lockout clauses are a “usual term[] and condition[] of employment” to be covered under a collective agreement. *See Genuardi Super Markets, Inc.*, 172 NLRB 1357, 1364 (1968). Here, corresponding to the Minority Union USW’s no-strike agreement, AM/NS pledged that it would “not to resort to the lockout of Employees to support its bargaining position.” (Ex. 3, AM/NS Answer, ¶ 6(c); Ex. 7, USW Answer, ¶ 5(a).) This was a significant concession granted only to the Minority Union USW and not to any other labor organization.

**III. The “Neutrality Agreement” Provisions Are Also Invalid As Applied.**

The arrangement here between AM/NS and the Minority Union USW is not only is invalid *per se*, but also as applied. AM/NS was not free to follow Arbitrator Dilts’s open contempt for employee Section 7 rights, to punish employees opposing organization, and to deny employees

who opposed the Minority Union USW the same facility access that the Minority Union USW received.

If there was any confusion about what the Basic Labor Agreement’s “Neutrality Agreement” required of AM/NS, such confusion was put to rest when Arbitrator Dilts ordered: “Access to employees by groups other than the Union shall not be permitted by the Employer on company time or property if the purpose of that group is to present a case contrary to that presented by the union.” (Ex. 3, AM/NS Answer, Ex. B, Apr. 4, 2019 Award p. 34.) Arbitrator Dilts then followed up a few weeks later and explained: “To provide access to employees or groups who oppose unionization is a clear breach of neutrality .... For the employer to assert that the anti-union groups and employees have a federally protected right to present a contrary case to the unionization of its workforce is not an issue in this matter.” (*Id.*, AM/NS Answer, Ex. B, Apr. 19, 2019 Arbitrator’s Opinion, p. 6.)

The access provided to the Minority Union USW here—and denied to all others—goes well beyond “ministerial aid.” *See* Memorandum GC 20-13 (Sept. 4, 2020), at p. 6. AM/NS’s acts in allowing the Minority Union USW access to its facility to express pro-USW views while denying similar access to all others had the effect of conferring on the Minority Union USW “a deceptive cloak of authority.” *See Bernhard-Altmann*, 366 U.S. at 736. Moreover, AM/NS granted the Minority Union USW such access before it represented a majority of employees, notwithstanding that the terms of such access would constitute a mandatory subject of bargaining once (and if) the Minority Union USW obtained majority support. *See Ernst Home*, 308 NLRB at 849. Regrettably, AM/NS’s violation of Sections 8(a)(1) and 8(a)(2) is clear on this record.

### **Conclusion**

There are no material facts to be decided here, and nothing remains on this record that would otherwise warrant an evidentiary hearing. Therefore, Employer Respondent AM/NS asks the Board to (1) transfer this case and continue proceedings before the Board; (2) deem the material factual allegations set forth in the Complaint and Notice of Hearing issued in Case 15-CA-244523 and in the Complaint and Notice of Hearing in Case 15-CB-244598 to be true without the need to take evidence supporting these allegations; and (3) grant summary judgment and issue a Decision and Order accordingly. Such Decision and Order shall include findings that Employer Respondent AM/NS violated Sections 8(a)(1) and 8(a)(2) of the Act and that the Minority Union Respondent USW violated Sections 8(b)(1)(A) and Section 8(b)(2) of the Act.

*/s/ John J. Coleman III*

John J. Coleman III

Marcel L. Debruge

Ronald W. Flowers

ATTORNEYS FOR RESPONDENT

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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 15**

<b>AM/NS Calvert, LLC</b>	)	
	)	
<b>and</b>	)	
	)	<b>Case Nos. 15-CA-244523</b>
	)	<b>15-CB-244598</b>
<b>AUSTIN SEAMANDS</b>	)	
	)	
<b>and</b>	)	
	)	
<b>UNITED STEEL, PAPER, AND FORESTRY,</b>	)	
<b>RUBBER, MANUFACTURING, ENERGY,</b>	)	
<b>ALLIED INDUSTRIAL AND SERVICE</b>	)	
<b>WORKERS INTERNATIONAL UNION</b>	)	

**AFFIDAVIT OF SERVICE**

I, the undersigned counsel for AM/NS Calvert, LLC, being duly sworn, hereby certify that a copy of the foregoing was electronically filed with the Executive Secretary of the Board in Washington, DC and sent to the following via e-mail, on this the 21st day of January, 2021:

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/s/ John J. Coleman III  
OF COUNSEL

## **APPENDIX C**

*Letter from Mark E. Arbesfeld, Director Office of Appeals to Philip A. Miscimarra and Lauren  
Emery acknowledging receipt of Appeal  
(March 12, 2021)*



**UNITED STATES GOVERNMENT**  
**NATIONAL LABOR RELATIONS BOARD**  
**OFFICE OF THE GENERAL COUNSEL**  
Washington, DC 20570

March 12, 2021

PHILIP A. MISCIMARRA, ESQ.  
LAUREN EMERY, ESQ.  
MORGAN LEWIS & BOCKIUS LLP  
1111 PENNSYLVANIA AVE NW  
WASHINGTON, DC 20004-2541

Re: International Brotherhood of Teamsters,  
Local 117 and Local 313 (United Natural  
Foods, Inc. d/b/a United Natural Foods, Inc.  
and SUPERVALU, Inc.)  
Case 19-CB-250856

Dear Mr. Miscimarra, Ms. Emery:

We have received your appeal and accompanying material. We will assign it for processing in accordance with Agency procedures, which include review of the investigatory file and your appeal in light of current Board law. We will notify you by email, if an email address is provided, and all other involved parties as soon as possible of our decision.

Sincerely,

Peter Sung Ohr  
Acting General Counsel

A handwritten signature in black ink that reads "Mark E. Arbesfeld". The signature is written in a cursive style.

By: \_\_\_\_\_  
Mark E. Arbesfeld, Director  
Office of Appeals

International Brotherhood of Teamsters,  
Local 117 and Local 313 (United Natural  
Foods, Inc. d/b/a United Natural Foods, Inc.  
and SUPERVALU, Inc.)  
Case 19-CB-250856

-2

cc: RONALD K. HOOKS  
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kh

**APPENDIX D**

*Letter from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel to Charles F. Willis, Jr. Assistant to the Assistant to the President  
(February 23, 1954)*

~~CONFIDENTIAL~~

Department of Justice  
Washington

FEB 23 1954

Mr. Charles F. Willis, Jr.,  
Assistant to The Assistant to the President,  
The White House,  
Washington, D. C.

Dear Mr. Willis:

This is in reply to your memorandum of February 9,  
1954, to the Attorney General concerning the power of the  
President to remove George J. Bott from his position as  
General Counsel of the National Labor Relations Board.

I am enclosing herewith a memorandum prepared in  
this office, in which it is concluded that the President  
has authority to remove the General Counsel of the National  
Labor Relations Board before the completion of his four-  
year term under the rule of Myers v. United States, 272 U.S.  
52, with which I agree.

Sincerely yours,

*J. Lee Rankin*

J. Lee Rankin  
Assistant Attorney General  
Office of Legal Counsel

Enclosure

*+ Justice Dept.*

~~CONFIDENTIAL~~

DETERMINED TO BE AN  
ADMINISTRATIVE MARKING  
E.O. 12065, Section 1

By DTH NLE, Date 12/3/79

FEB 23 1954

MEMORANDUM

Re: Authority of the President to remove the General  
Counsel of the National Labor Relations Board

The office of General Counsel was created by the provisions of section 3(d) of the Labor Management Relations Act of 1947, 61 Stat.

139, 29 U.S.C. 153. The pertinent language reads:

"There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law."



The present incumbent of the office of General Counsel of the National Labor Relations Board was appointed September 29, 1950. His term will not expire, therefore, until September 29, 1954. It is my opinion that the President may remove him from office before the completion of his four-year term under the rule of Myers v. United States, 272 U.S. 52.

The Myers case concerned a postmaster who was removed from office by order of the Postmaster General, acting by direction of the President. The pertinent statute provided that postmasters were to be appointed by

the President for a term of four years unless sooner removed or suspended by law and that they were to be removed by the President only with the advice and consent of the Senate. The Senate did not consent to the President's removal of Myers during his term. The Court held that the statutory limitation on the President's power of removal was unconstitutional, pointing out that the President was empowered by the Constitution to remove any executive official appointed by him by and with the advice and consent of the Senate and that this removal power was not subject to the assent of the Senate and could not be made so by an act of Congress.

There would appear to be little doubt that the General Counsel of the National Labor Relations Board is an executive official subject to removal at the pleasure of the President. The legislative history of the Labor Management Relations Act amply supports such a conclusion. The statement on the part of the managers concerning the Conference Report on H. R. 3020, later enacted into the Labor Management Relations Act, contains the following with reference to the provision creating the office of General Counsel of the Board. House Report No. 510, 80th Congress, 1st sess., p. 37 -

"\* \* \* The conference agreement does not make provision for an independent agency to exercise the investigating and prosecuting functions under the act, but does provide that there shall be a General Counsel of the Board, who is to be appointed by the President, by and with the advice and consent of the Senate, for a term of 4 years. The General Counsel is to have general supervision and direction of all attorneys employed by the Board (excluding the trial examiners and the legal assistants to the individual members of the Board), and of all the officers and employees in the



Board's regional offices, and is to have the final authority to act in the name of, but independently of any direction, control, or review by, the Board in respect of the investigation of charges and the issuance of complaints of unfair labor practices, and in respect of the prosecution of such complaints before the Board. He is to have, in addition, such other duties as the Board may prescribe or as may be provided by law. By this provision responsibility for what takes place in the Board's regional offices is centralized in one individual, who is ultimately responsible to the President and Congress."

The Labor Management Relations Act itself contains striking evidence of the express Congressional intention of distinguishing the status of the General Counsel from that of the Board members. Limitations are placed upon removal of Board members in section 3(a):

"Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause."



In creating the office of General Counsel, no limitation on the presidential power of removal was included.

The decision of the Supreme Court in Humphrey's Executor v. United States, 295 U. S. 602, did not limit the President's power of removal as applied to executive officers. In the Humphrey's case the Court held that the President could not remove a member of the Federal Trade Commission, but distinguished the case from that of Myers by reliance upon the fact that members of the Federal Trade Commission exercised quasi-judicial and quasi-legislative functions. In addition, the Court emphasized the legislative history of the Federal Trade Commission Act as indicating a Congressional intention to secure the maximum independence of the Commission from Executive interference and control.

In my opinion, the Humphrey's case casts no doubt upon the authority of the President to remove the General Counsel of the National Labor Relations Board at his pleasure. The functions of the General Counsel are in no sense of a quasi-legislative or quasi-judicial nature. The investigative and prosecutive functions for which that officer is responsible under the express language of the Labor Management Relations Act and its legislative history are solely executive in character, similar to those of a prosecuting attorney. The President may remove a district attorney. The Supreme Court has held in the case of a district attorney that the term of four years is not an unconditional term of office for that period. The term is limited to four years, but there is no grant of a four-year term. Parsons v. United States, 167 U. S. 324, 338.



The report of the Conference Committee points out the Congressional purpose to vest in the office of the General Counsel investigative and prosecutive functions free from any restraint by the Board itself, but at the same time to keep him responsible to the President. The functions of the General Counsel may not be said to be in any sense quasi-judicial or quasi-legislative in character. It is true that in executing his functions he may have to provide certain rules of procedure, and to make certain decisions. "In this respect his duties are, in no wise, different, except perhaps in degree, from the duties of any other administrative officers or agencies \* \* \*, either private or public." Morgan v. Tennessee Valley Authority, 115 F. 2d 990, 994.

**APPENDIX E**

*Memorandum John G. Roberts to Fred F. Fielding, White House Counsel re: NLRB Dispute  
(July 18, 1983)*

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 18, 1983

FOR: FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: NLRB Dispute

On July 14, Donald Dotson sent Mr. Hauser a note advising that Dotson and NLRB member Robert Hunter wanted to meet with him to "discuss alternatives" in connection with the dispute at NLRB concerning the respective powers of the Solicitor and the General Counsel. Dotson enclosed a legal analysis of the dispute and noted that it was urgent that the matter be resolved. Hauser asked that I review the question and determine (1) whether the Board had the authority to act as it did in transferring authority from the General Counsel to the Solicitor, (2) whether the General Counsel may be removed by the President, (3) if the General Counsel's defiance of the Board directive constitutes "cause" for removal of the General Counsel, and (4) how Mr. Meese's office is involved in the dispute.

I first reported on this dispute in a memorandum of May 18, 1983 (attached). You will recall that on May 4, 1983, the Board required the General Counsel to submit "all pleadings and briefs in proceedings involving enforcement, review, Supreme Court litigation, contempt, and miscellaneous litigation" to the Solicitor for his review, and directed that such pleadings and briefs may be filed only after approval of the Solicitor, acting for the Board. The Board also assumed authority to "transfer, promote, discipline, discharge" and take other appropriate personnel action with respect to NLRB attorneys engaged in the activities to be reviewed by the Solicitor. The General Counsel, however, was directed to exercise "general supervisory responsibility" over those attorneys.

The legal memorandum submitted by Dotson defends the Board's action by noting the statutory authority of the Board to "appoint... attorneys... necessary for the proper performance of its duties... Attorneys appointed under this section may, at the discretion of the Board, appear for and represent the Board in any case in court." 29 U.S.C. § 154(a). The Board recognizes that the General Counsel, under 29 U.S.C. § 153(d), has independent authority to investigate charges and issue unfair labor practice complaints. The Board's action does not affect attorneys employed in these areas. The Board maintained, however, that the General Counsel's

authority to represent the Board in court is based not on any similar statutory grant of authority but rather on a revocable delegation of authority from the Board. The Board's legal memorandum notes that a similar dispute between the Board and its General Counsel arose in 1950, and was resolved when the President requested and obtained the General Counsel's resignation.

We have not been provided with a copy of the General Counsel's legal analysis, but I understand that it focuses on the language of 29 U.S.C. § 153(d): "The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board..." This clear statutory language, according to the General Counsel, flatly prohibits any effort by the Board to place control over enforcement and appellate attorneys in the hands of the Solicitor. Simply stating, as the Board did, that the General Counsel will continue to exercise "general supervisory responsibility" over such attorneys is a meaningless assertion in the face of the Board's requirement that the Solicitor review and approve briefs and pleadings and the Board's assertion of authority over attorney promotions, disciplining, transfers, and terminations.

As I pointed out in my earlier memorandum, the Board's position is not illogical, nor does it contravene the intent of the Taft-Hartley Act, which established the office of NLRB General Counsel. It was the purpose of that Act to insulate the General Counsel from the Board with respect to the presentation of complaints before the Board. Such insulation with respect to enforcement of orders issued by the Board was not necessary (no problem of commingling adjudicative and prosecutive roles being present once the Board had issued an order), and accordingly this question was not specifically addressed by the Taft-Hartley amendments. In addition, there is a great deal of common sense appeal to the proposition that the Board should be able to control the legal arguments presented on its behalf before the courts.

On the other hand, the plain language of 29 U.S.C. § 153(d) presents a major hurdle to the Board's legal analysis. Even if the intent of Congress was only to insulate NLRB attorneys from the Board with respect to the filing of complaints, the language chosen -- giving the General Counsel "general supervision over all attorneys employed by the Board" (emphasis supplied) -- is not so limited. In sum, it is not apparent which side in this dispute would prevail if the matter were put to the proof, which in this case would presumably entail an Attorney General opinion rather than a court test.

There is a clear answer to the second query posed by Mr. Hauser. In an opinion dated March 11, 1959, Malcolm Wilkey, then Assistant Attorney General for the Office of Legal Counsel, concluded that "the General Counsel of the Board is a purely Executive Officer and that the President has inherent constitutional power to remove him from office at pleasure under the rule of Myers v. United States, 272 U.S. 52." We were advised in April of this year that the Department of Justice still adhered to the Wilkey opinion. Since the General Counsel serves at the pleasure of the President, it is unnecessary to consider Mr. Hauser's third question, viz., whether the General Counsel's conduct constitutes "cause" justifying Presidential dismissal for cause.

With respect to the fourth question, Ken Cribb advised me on July 15 that it was his understanding that Craig Fuller would be meeting with Dotson to discuss the matter, at Mr. Meese's direction. Hauser called Fuller, who seemed unaware of any such arrangement. In any event, Hauser advised Fuller that our office was looking into the matter and should be kept apprised of any developments.

In light of the NLRB's status as an independent agency, we should keep some distance from the legal dispute. Dotson may want a meeting to discuss firing the General Counsel, the step taken over thirty years ago when the NLRB was similarly deadlocked. Since such a move can only come from the President, we are inevitably involved if Dotson seeks that solution. I would, however, recommend against taking sides in the legal dispute. Dotson took this action without consulting us or, more appropriately, the Justice Department, and we should not be anxious to sleep in a bed not of our own making.